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No. 06-1611

In The Supreme Court of the United States

TONY HAYS AND CHARLES C. THOMPSON, II,
Petitioners/Appellants,

And

WORLDNETDAILY.COM AND REBECCA HAGELIN,
Petitioners/Appellants,

v.

CLARK JONES,
Respondent/Appellee.

On Petition for Writ of Certiorari to the Tennessee Supreme Court

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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LEGAL ADVANTAGE

QUESTIONS PRESENTED

1. In a civil defamation case seeking damages against newsgatherers, do the newsgatherer defendants, under the First Amendment's freedom of press, have privilege not to divulge the identity of confidential sources of information disseminated as news?

2. If, in a civil defamation case seeking damages, freelance reporters (non-employee, non-independent contractors) refuse to reveal confidential sources for information included in the posted news story, does First Amendment freedom of press prohibit the internet disseminator who does not have access to the identity from being forced to stand trial estopped by an order that restrains the disseminator from claiming that the subject information is true or that the disseminator believed the information was true?

PARTIES

Respondent/Appellee/Plaintiff, Clark Jones (hereinafter **"Jones"**) is a *sui juris* adult citizen who is a resident of Savannah, Hardin County, Tennessee. Jones filed the lawsuit that initiated defamation and associated civil claims against various defendants in the circuit court of Hardin County, Tennessee. In his lawsuit, Jones seeks no remedy other than money damages.

Petitioners/Appellants/Defendants, Tony Hays and Charles C. Thompson, II (hereinafter **"Reporters"**) are *sui*

juris adult persons who, respectively, are residents of Harden County, Tennessee and Fairfax County, Virginia.

Petitioner/Appellee/Defendant, WorldNetDaily.com (hereinafter **"WND"**), is a corporate person duly existing in accordance with a charter issued by Delaware and is and at all times relevant hereto has been doing business in the State of Oregon. WND is a disseminator of news stories by posting same on the WND internet website in Oregon. WND is a defendant in the lawsuit as originally filed by Jones.

Petitioner/Appellee/Defendant, Rebecca Hagelin (hereinafter **"Hagelin"**) is a *sui juris* adult who is a resident of Arlington County, Virginia. At times relevant to the claims of Jones, Hagelin was an employee of WND. Hagelin is a defendant in the lawsuit as originally filed by Jones.

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CITATION OPINIONS/ORDERS

The first germane order below was entered April 8, 2005 by the trial court and entitled "Order Granting Plaintiff's Motion In Limine To Strike Defenses To Defamation Asserted By Defendants Relying On Unnamed And Undisclosed Sources Or, In The Alternative, To Compel Defendants, Tony Hays, Charles C. Thompson, II To Disclose Sources" (hereinafter "**Strike Order**") (A. Q).

From the Strike Order, Reporters appealed to the Tennessee Court of Appeals (hereinafter "**court of appeals**"), and WND/Hagelin exercised rights pursuant to ***Tennessee Rules of Appellate Procedure***, Rule 13(a) to bring up and assert issues in the Reporters' appeal (A. P).

On July 11, 2006, the court of appeals, *sua sponte*, filed an "Order" dismissing the appeal (A. H).

WND/Hagelin, on July 21, 2006, filed a petition to rehear (A. G) the court of appeals July 11, 2006 Order, and, on July 24, 2006, Reporters filed a petition to rehear (A. F).

On September 28, 2006, the court of appeals filed an order denying WND/Hagelin's petition to rehear (A. D), and, on September 25, 2006, the court of appeals filed an order denying Reporters a rehearing (A. E).

On November 21, 2006, Reporters, pursuant to ***Tennessee Rules of Appellate Procedure***, Rule 11, filed application for permission to appeal to the Tennessee Supreme Court (hereinafter "**supreme court**") (A. C); on November 28, 2006, WND/Hagelin filed an appeal as of

right, pursuant to *TCA* §24-1-208(c)(3)(C), and, alternatively, a Rule 11 application (A. B).

On February 26, 2007, the supreme court filed an order (A. A) reading, in pertinent part, as follows:

> Tony Hays and Charles C. Thompson, II have filed an application for permission to appeal. WorldNetDaily.com, Inc. and Rebecca Hagelin what they style as an appeal as of right under Tenn. Code Ann. §24-1-208(c)(3)(C) or, alternatively, an application/appeals for permission to appeal. After due consideration, it is ordered that all applications are denied.

None of the orders above-referenced are published other than in the official records of the Tennessee courts.

JURISDICTION

The July 11, 2006 Order of the court of appeals became subject to review in this Court only after the supreme court's February 26, 2007 order denying the applications of WND/Hagelin and Reporters' requesting the supreme court to review and reverse the court of appeals' July 11, 2006 Order dismissing the appeal of Reporters from the trial court's April 8, 2005 Strike Order

The date of the court of appeals order denying petition to rehear in the court of appeals was September 28, 2006; there was not a petition requesting the supreme court to rehear its February 26, 2007 order refusing to review the

court of appeals' September 28, 2005 order dismissing the appeal of Reporters.

This is not a cross-petition for writ of certiorari.

The statutory basis for this Court's jurisdiction is Title 28, ***United States Code*** §1257(a).

The Tennessee Attorney General is on notice and made appearance in the court of appeals. This petition is served on the Tennessee Attorney General.

CONSTITUTIONAL PROVISIONS/STATUTES

The United States Constitution, First Amendment, in part pertinent here, reading as follows:

> Congress shall make no law...abridging the **freedom of**...the **press**....

The only statute at issue is ***TCA*** §24-1-208 (A. Z);

it is alleged to have been applied below in violation of petitioners' freedom of press.

STATEMENT OF THE CASE

On March 12, 2001, Jones filed a complaint, subsequently amended (R. 30 pp. 92-110). The complaint alleges claims for libel and defamation, with associated claims, for a series of articles (A. Y) written by Reporters, freelance, and thereafter, purchased by WND and posted on the WND website Oregon for dissemination to whomever, if anybody, anywhere in the entire world (including Tennessee) chose to access the information.

On November 26, 2001, Reporter, Hays, filed his answer (R.1 p.26) to the complaint (R.1 p.1) including the following (R.1 p.30):

> This Answering Defendant acted within his First Amendment rights at all times relevant to this action. All or some of the conduct alleged by Plaintiff was privileged.
>
> ***
>
> Some or all Defendants enjoy absolute immunity, as members of the press, from the liability alleged in this case by Plaintiff.
>
> ***
>
> Some or all Defendants enjoy qualified immunity, as members of the press, from the liability alleged in this case by Plaintiff.

Reporter, Hays, reasserted the same defenses (R.3 pp.125, 130, 131). Reporter, Thompson, asserted the same claims in his answer (R. 6 pp. 30, 36, 37). WND asserted the following affirmative defenses in its answer (R. 10 pp. 74, 82, 83):

> WND has qualified immunity, as a member of the press, from liability based on the claims alleged in the first amended complaint.
>
> WND has absolute immunity, as a member of the press, from liability based on the

> claims alleged in the first amended complaint.
>
> ***
>
> The actions/omissions of WND set forth in the first amended complaint as a cause of action are protected and privileged under the First Amendment to the United States Constitution, as applied to the states by the Fourteenth Amendment, and under Article 1, §19 of the Tennessee Constitution.

Hagelin asserted the same defenses as WND (R. 10 pp.93, 101, 102).

On March 15, 2004, Jones filed a motion (R. 11 p. 20) requesting the trial court either to strike defenses to defamation relying on undisclosed sources or to compel Reporters to disclose their confidential sources (hereinafter **"Strike Motion"**).

On August 9, 2005, WND responded in opposition (A. S) to the Strike Motion (A. U) and incorporated by reference the June 11, 2004 response in opposition previously filed by a then co-defendant, thereby, raising constitutional issues in opposition.

The April 8, 2005 Strike Order (A. Q) reads as follows:

> It appearing to the court that T.C.A. §24-1-208 is quite clear and that the defendants Hays and Thompson have continued, without equivocation, to assert their claim of

privilege as to the unnamed sources and have refused to answer questions as to the identity of said sources.

IT IS THEREFORE, ORDERED, AJUDGED AND DECREED that each and all defenses of the defendants based upon information received from unnamed source are hereby stricken and

Defendants are hereby barred from relying on information received from unnamed and unidentified sources in this case as the bases of any defense therein.

On June 1, 2004, the trial court filed an order (A. U). The trial court ended with a last sentence that reads as follows: [D]efendant's Motion in the Alternative for the Court to **declare** Mr. **Jones a 'public figure'** is GRANTED" (A. U6).

On July 29, 2004, a sworn affidavit of WND was filed in support of the WND/Hagelin motion for summary judgment (R. 17 pp. 122-133). On July 29, 2004, WND/Hagelin filed a concise statement of undisputed facts in support of the motion for summary judgment by WND/Hagelin.

On August 27, 2004, Jones filed a response (R. 18 pp. 57-109) to the concise statements of undisputed facts filed by WND/Hagelin.

On September 13, 2004, "WND/Hagelin Concise Statement With Jones Rule 56.03 Position" was filed. This is a chart, with parallel columns that quote the concise statement of undisputed facts, one fact at a time, side-by-side, with the response of Jones, one fact at a time, to each of WND/Hagelin's statements of fact (R. 18 pp. 57-109). The chart is of record (R. 25 pp. 97-123).

STATEMENT OF FACTS

This case involves some parts of some of the eighteen (18) news articles posted by WND on WND's website in Oregon. A table of contents/index providing the titles and dates by and on which the internet posting was done (A. Y) facilitates ready access to the news articles. The only findings of fact by the trial court are those found to be undisputed in the trial court's June 1, 2004 order (A. U).

Jones made statements in documents filed by Jones in the trial court (A. W) and, those statements quoted verbatim, constitute indisputable facts, because neither Reporters nor WND/Hagelin dispute the factuality of Jones' statements of fact.

In addition, there are statements of fact, filed by WND/Hagelin and admitted by Jones (R.25 pp.97-123) to be undisputed.

The series of quotations from the September 20, 2000 article (A. R4-R5) are admitted by Jones to be accurately stated; there is no dispute that the quoted statements were posted by WND on WND's website.

The sworn affidavit of WND makes oath as follows (A. R4-R5):

> 56. In spite of the quoted references in the immediately preceding enumerated paragraph, WND never gathered or attempted to gather any of the information reported in any of the news articles that are the subject of the instant lawsuit; the references quoted [i.e., that WND gathered the information in the article] were added by WND after WND purchased the use of the already-completed news articles from Mr. Hays/Mr. Thompson.

The sworn affidavit of WND makes oath as follows (R. 17 p.128):

> 57. Other than what Mr. Hays/Mr.Thompson reported, WND had no knowledge ... that any of the sources with whom WND is reported to having interacted even existed.

WND/Hagelin quoted those statements (R. 17 pp. 127-128) from the September 20, 2000 article and verified, under oath (R. 17 p. 128), that the quoted statements are non-factual, i.e., do not state reality but state non-reality, i.e., WND put in the article that WND gathered the information when, in fact, WND did not gather the information. Jones cites no evidence of record that disputes

the sworn evidence of record that the statements quoted from the September 20, 2000 article have no basis in fact.

WND provided a supplemental response to Jones' interrogatory number 34 detailing how WND received the articles WND posted and what all WND did with the articles when WND received them (A. Y).

Federal Questions Raised Below

In the trial court, Reporters and a subsequently dismissed defendant, Center for Public Integrity, Inc., asserted rights derived from the First Amendment to be shielded from a requirement that the names of confidential sources be disclosed, pursuant to ***TCA*** 24-1-108 (A. Z); WND/Hagelin joined in support of the asserted shield right (A. S2; T1, T12).

Reporters perfected their appeal of the Strike Order (A. O) pursuant to the provision of ***TCA*** §24-1-208(c)(3)(B). On appeal, Reporters asserted claim that, as applied by the trial court, ***TCA*** §24-1-208 is an unconstitutional violation of the freedom of press guaranteed by the First Amendment (A. N).

Reporters duly provided notice to the Tennessee Attorney General of the challenge by Reporters to the constitutionality of §24-1-208. Thereafter, the Tennessee Attorney General appeared of record, submitted a brief (A. K) and argued in the court of appeals in defense of the constitutionality of §24-1-208, as applied.

ARGUMENT

This Court has never decided whether, in a civil defamation action, newsgatherers have any First Amendment or federal common law privilege to withhold disclosure of confidential sources. This Court explicitly has held that a newsgatherer, when appearing before a state or federal grand jury, has no First Amendment privilege to withhold disclosure of confidential sources. ***Branzburg v. Hayes***, 408 U.S. 665 (1972).

To assess exactly where the law is concerning the constitutional rights of newsgatherers to withhold disclosure of confidential sources, a current-day analysis of ***Branzburg*** is helpful.

Branzburg was decided in 1972. There is no Justice now serving on this Court who was on this Court at the time. The decision was joined by Chief Justice Burger and Justices White, Douglas, Black and Rehnquist; Justice Powell concurred in the Court's opinion with a separate opinion; Justices Brennan, Marshall and Stewart filed a dissenting opinion. ***Branzburg*** held that there existed no First Amendment privilege that shielded a newsgatherer from divulging confidential sources to federal and state grand juries. The responsibility of grand juries was stated by this Court to be the driving force that produced the

opinion in ***Branzburg***, and courts have followed this Court's limitation on ***Branzburg's*** applicability.

The dissenting opinion in ***Branzburg*** is as comprehensive a statement as could be made concerning the policy reasons for recognition of a First Amendment privilege that shields newsgatherers from divulging confidential sources. To the dissenting Justices, not even the law enforcement duties of grand juries outweighed the societal demands that newsgatherers have this First Amendment privilege of nondisclosure. The dissenting Justices came close to conceiving that this First Amendment privilege should be absolute.

This Court has never passed judgment on how, if at all, the freedom press policies the dissenting Justices articulated in ***Branzburg*** ought to apply in the context of a court order to a newsgatherer to divulge the identity of confidential sources in a civil defamation case or any other civil proceeding.

In the instant case, Reporters are defendants who have asserted as one of their affirmative defenses that the disseminated information is true. The trial court made no findings that there were any compelling reasons that required a court order to disclose the identity of the

Reporters' confidential sources. Concededly, most of the disseminated information is tied to identified sources and, quantitatively, only a small portion of the information disseminated is attributed to confidential sources.

Relying on ***TCA*** §24-1-208, the trial court ordered that Reporters divulge the identity of the confidential source or drop the Reporters' truth defense and refrain from any allusion to any of the disseminated information being truthful. WND/Hagelin concededly do not have the identity of the confidential source, but WND/Hagelin were saddled with the same restrictions as Reporters with respect to the truth defense or any allusion to the disseminated information being true.

The court of appeals more pointedly addressed the issue, i.e., the court of appeals ruled that there does not exist any privilege to withhold disclosure of confidential sources. The constitutional issues were briefed in the trial court (A. N) and were more thoroughly briefed and argued in the court of appeals (A. C).

The ruling of the court of appeals essentially extends the opinion in ***Branzburg*** so there is no privilege of a newsgatherer who asserts the affirmative defense of truth in

answer to a civil lawsuit for defamation against the newsgatherer.

Neither the trial court nor the court of appeals spoke in terms of there being a qualified privilege or that there was any interest (public or private) to balance or to weigh against any other interest (public or private). The court of appeals simply ruled that there was no privilege; therefore, it would have been incongruent for the court of appeals to find any need to balance varying public or private interests. From the court of appeal's perspective, there being no privilege, there is no swinging pendulum; **in every defamation case against every newsgatherer, every time, the newsgatherer must disclose confidential sources or sacrifice the truth defense, inclusive of any allusion to the disseminated information being true**, i.e., that the newsgatherer believes or believed then the information to be true.

In 1978, consistent with his dissent in ***Branzburg***, Justice Marshall expressed, in a published order on a stay application, his disposition that a newsgatherer is or ought

to be protected by the First Amendment against an order to divulge confidential sources.[1]

Both United States Courts of Appeal, federal district courts and state supreme courts have specifically addressed the issue concerning a newsgatherer's First Amendment privilege to withhold disclosure **in a civil case** and have determined that such a privilege exists.[2]

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[1] ***New York Times Co. v. Jascalevich***, 439 U.S. 1331(1978) at 1335 ("Given the likelihood that forced disclosure even for in camera review will inhibit the reporter's and newspaper's exercise of First Amendment rights, I believe that some threshold showing of materiality, relevance, and necessity should be required.")

[2] ***Baker v. F & F Investment***, 470 F.2d 778 (2d Cir. 1972) cert. den. 411 U.S. 966 (1973) at 783 ("[W]e are of the view that there are circumstances, at the very least in civil cases, in which the public interest in non-disclosure of a journalist's confidential sources outweighs the public and private interest in compelled testimony."); ***United States v. Burke***, 700 F.2d 70 (2d Cir. 1983) cert. den. 464 U.S. 816 (1983) at 76-77 ([D]isclosure may be ordered only upon a clear and specific showing that the information is: highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources."); ***Riley v. City of Chester***, 612 F.2d 708 (3d Cir. 1979) at 715 ("The strong public policy which supports the unfettered communication to the public of information, comment and opinion and the Constitutional dimension of that policy, expressly recognized in *Branzburg v. Hayes*, lead us to conclude that journalists have a federal common law privilege, albeit qualified, to refuse to divulge their sources."); ***United States v. Cuthbertson***, 630 F.2d 139 (3d Cir. 1980) cert. den. 449 U.S. 1126 (1981) at 146 ("[I]n our recent decision in *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979), we held that journalists have a federal common-law privilege arising under Fed.R.Evid. 501 to refuse to divulge their confidential sources."); ***Cervantes v. Time***, 464 F.2d 986 (8th Cir. 1972) reh. den. (1972) at 993 ("[T]o compel a newsman to breach a confidential relationship merely because a libel suit has been filed against him

There is an indicative sequence of events. This Court decided ***Branzburg*** on June 29, 1972. One of the strongest statements articulating the First Amendment right of newsgatherers, in a civil case, to withhold disclosure of confidential sources is the Second Circuit's, in ***Baker v. F&F Investment***, *supra* at 14 n2, decided December 7, 1972 (less than 6 months after ***Branzburg***). This Court denied a writ of certiorari in ***Baker*** on May 7, 1973 (less than a year after ***Branzburg***).

Thus, the very next case involving the right of a reporter to withhold the identity of a confidential source found Chief Justice Burger and Justices White, Douglas,

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would seem inevitably to lead to an excessive restraint on the scope of legitimate newsgathering activity."); ***Silkwood v. Kerr-McGee Corp.***, 563 F.2d 433 (10th Cir. 1977) at 436 ("At the same time the court noted that *Branzburg* has been limited in its scope to criminal cases and that a qualified privilege is developing in civil actions."); ***Altemose Const. Co. v. Building and Const. Trades Council of Philadelphia***, 443 F. Supp. 489, 491 (E.D. Pa. 1977); ***Gilbert v. Allied Chemical Corp.***, 411 F.Supp. 505 (E.D. Va. 1976) at 508 ("Accordingly, the Court holds that the First Amendment, protecting as it does the free flow of information, provides newsmen a privilege from revealing their confidential news sources in civil proceedings that may be abrogated only in rare and compelling circumstances."); ***Loadholtz v. Fields***, 389 F.Supp. 1299 (M.D. Fla. 1975) at 1300 ("This court concludes that the paramount interest served by the unrestricted flow of public information protected by the First Amendment outweighs the subordinate interest served by the liberal discovery provisions embodied in the Federal Rules of Civil Procedure"); ***Brown v. Commonwealth of Virginia***, 204 S.E.2d 429 (Va. 1974) at 431 ("We believe that, as a news-gathering mechanism, a newsman's privilege of confidentiality of information and identity of his source is an important catalyst to the free flow of information guaranteed by the freedom of press clause of the First Amendment.").

Rehnquist and Black, joining Justices Powell, Marshall, Brennan and Stewart in denying certiorari in a civil case where the court of appeals declared there to be a First Amendment privilege not to divulge. Certiorari was again denied, in a civil case, in 1983 in ***Burke,*** *supra*, at 14 n.2.

On December 7, 2006, there was filed, in the case of ***In re: Grand Jury Subpoenas To Mark Fainaru-Wada, Lance Williams and The San Francisco Chronicle***, Nos. 06-16995,06-16996 (9th Cir. 2006), a "Brief And Appendix For Amici Curiae States Of ... **Tennessee**, ... In Support Of Reversal Of The District Court" (emphasis added) (A. V4).

No decision has yet been filed in the Ninth Circuit. The issue, in light of ***Branzburg***, involves whether there is or should be a federal common law privilege, even though there is no First Amendment privilege, for newsgatherers to withhold disclosure before grand juries. The position of the 24 amici states [including Tennessee] and Puerto Rico is summarized in their brief (A. V5):

> In determining whether to recognize a federal common-law evidentiary privilege, federal courts consider the policies of the states ... . [M]oreover, that privilege should require that any effort **to overcome** it **include** a **showing** that the **public interest in disclosure outweighs** the **public interest in confidentiality**. A lesser federal privilege

> ..., renders meaningless the states' protections and chills speech as much as a complete absence of state protection would. (emphasis added)

Earlier in the amici brief, amici state the interest of amici as follows (A. V4-V5):

> Twenty-four states [including Tennessee] and the Commonwealth of Puerto Rico file this amici brief ... . [T]his protection embodies the **amici** states' **recognition** that the **free flow of information is vital to the workings of a healthy democracy**; that **journalists play a crucial role in gathering** and reporting such **information**; that **the most important information** must **often** come **from sources who need or prefer to remain confidential; and that without the confidentiality guaranteed** by the reporter's privilege, the **sources will remain silent** and their information secret. The district court's decision undermines the states' protection by refusing to recognize a federal common-law privilege, let alone a privilege that would **consider the public's interests before requiring disclosure** of confidential sources. (emphasis added)

This is an abbreviated overview of the more in-depth treatment of the same subject by the dissenting Justices in ***Branzburg***.

This Court left without any doubt how expansive the First Amendment is applied to protect freedom of the press by affording newsgatherers and news disseminators extraordinary protection from common law defamation liability, especially when reporting on or about public figures. ***Bose Corp. v. Consumers Union of the United States, Inc.***, 466 U.S. 485 (1984). ***Bose*** summarizes law up to that time and the ***Bose*** progeny never cut back the First Amendment protection articulated by ***Bose***.

In short, this Court has ruled, emphatically, that the pre-***New York Times v. Sullivan***, 376 U.S. 254 (1964) common law rules ordinarily applied to govern defamation suits by public figures against newsgatherers and news disseminators were such infringements on freedom of the press that the First Amendment imposed significant restriction on rules of evidence, procedure and substantive law in such cases. The instant case is exactly such a case.

WND/Hagelin and Reporters contend that the Strike Order and ***TCA*** §24-1-208, as applied by the of the court of appeals, are precisely the kind of impediments the First Amendment prohibits.

Twelve years after this Court rendered its decision in ***Bose***, in a decision that has never failed to be followed on point, ruled that a publisher of information gathered by a

freelance reporter and sold to the publisher cannot be held to answer for defamation of a public figure, even if the newsgatherer is established to have provided the publisher false information, known by the newsgatherer to be false, unless the publisher, non-vicariously, can be proven, at the time of publication [not thereafter], to have known that the information was false. ***McFarlane v. Esquire Magazine***, 74 F.3d 1296 (D.C. Cir. 1996).

The court of appeals dismissed Reporters' appeal and WND/Hagelin's Rule 13(a) issues for no reason other than court of appeals' held that Reporters had no privilege, from any source, to withhold disclosure of confidential sources in a civil defamation case. It would be hard to conceive a more head-to-head confrontation than that between the First Amendment and the order of the court of appeals.

The court of appeals considered the question wholly a matter of statute, apparently unaffected by any constitutional restraint. In that context, the court of appeals starkly stated as follows (A. H2):

> Section 208(b) provides that 208(a) does not apply 'with respect to the source of any allegedly defamatory information in any case where the defendant in a civil action for defamation asserts a defense based on the source of such information.'

***

> [at 2] The Plaintiff [Jones] did not seek 'an order divesting such protection' under 208(c)(1), and since **no privilege exists** for the non-disclosure of information for sources in a civil action involving defamation, the procedure for divesting ... , and that the Defendants [Reporters and WND/Hagelin] have no right to appeal a decision which neither grants nor denies disclosure in face of the asserted privilege, because **none existed** to be divested, ... (emphasis added)

The trial court entered an order that makes both Reporters and WND/Hagelin pay a high price, if Reporters do not disclose.

If a non-public figure alleges that a newgatherer's disseminated information is false, and, in response, the newgatherer can neither respond that the information is true or believed to be true, because to do so the newsgatherer must breach the confidence of the source, the plaintiff is all but certain of a favorable verdict, i.e., the newsgatherer cannot establish the truth of what was published. The same scenario replayed with a public figure plaintiff; the public figure is at least half way to a favorable verdict, i.e., is relieved of having to prove the statement to be false and left only to prove malice.

Neither Reporters nor WND/Hagelin contend that the First Amendment right of newgatherers to withhold disclosure of confidential sources is absolute. If a litigant attempts to prove compelling reasons why a newsgatherer's privilege, in a particular case, cannot be exercised because rights of the litigant, thereby, will be sacrificed, the litigant has a heavy burden to make a "strong showing" (***Riley***, *infra*, 612 F.2d at 716) of need to set aside the newsgatherer's First Amendment privilege.

The heavy burden is probably no better illustrated than in ***Riley v. City of Chester***, 612 F.2d 708 (3[d]Cir. 1979) where the following appears at 717:

> The trial court recognized that it had an obligation to take these factors into account. In adjudicating Ms. Oliver to be in civil contempt, the judge stated that he had considered 'the nature of the case, the relevance and materiality of the information sought to be adduced; whether the information sought goes to the heart of and is crucial to the claims made by the party seeking to elicit the information and the issues framed by the pleading; and the availability of the information from other sources.' With respect to the 'availability of the information from other sources', the trial court merely noted that 'the information

> sought, namely the identity of the person who gave out the allegedly false and inaccurate information, is extremely crucial to the claims made by the plaintiff and the issues framed by the pleading, i.e., whether the defendants have acted deliberately to harass the plaintiff in his quest for public office; and I have considered from the testimony thus presented that the information appears not to be available from other sources.'
>
> The **trial court's findings** contain only a general assertion of necessity. The conclusory statements **fall far short** of the type of specific findings of necessity which may overcome the privilege. (emphasis added)

In unexplained contrast, the court of appeals, relying exclusively on ***TCA*** §24-1-208 (i.e., without any allusion to the reality that the First Amendment even exists), created a **you-ask-you-get-it rule** for public figure and non-public figure plaintiffs, alike, who request, from a newsgatherer-defendant in a defamation case in Tennessee, the identity of the newsgatherer's confidential source.[3]

---

[3] See ***Cervantes***, *supra* at 14 n.2 ("To compel .. merely because a libel suit .. filed .. seem .. excessive restraint ... .").

The Strike Order creates for WND/Hagelin the ultimate Hobson's Choice. Reporters and WND/Hagelin are prohibited from any reference to a confidential source and are muted in defending based on the truth of or a belief that the information attributed to the confidential source is/was true. This is tantamount to (if not an actual) a jury instruction that the information reported is false.

When Reporters and/or WND/Hagelin are asked if they believed or had reason to believe the information was true, their lips are sealed, unless they are willing to disclose their confidential source. The only escape for Reporters is to breach the confidence vested by the confidential source in Reporters. Neither WND nor Hagelin has any escape because WND/Hagelin do not have the identity of the confidential source to disclose.

In the court of appeals, Reporters explicitly raised issues asserting that the First Amendment protected Reporters from the necessity to disclose confidential sources and that, if §24-1-208 did or was being applied to deny the First Amendment rights of Reporters, §24-1-208 either is unconstitutional because it violates the First Amendment or was applied to Reporters in violation of their First Amendment rights.

The supreme court treated the application for permission to appeal and the appeal as of right to create no need on its part to hear the appeal; the refusal to hear the appeal was summarily denied without comment.

Based on the ruling of the court of appeals, it could not be more crystal clear that, if Tennessee law is what the court of appeals ruled it to be and what the supreme court considered there to be no need to review, in Tennessee, the one and only thing a public figure must do to force a newsgatherer to reveal confidential sources is file a lawsuit for defamation against the newsgatherer.

The newsgatherer, then, is in the trick bag--no further questions asked. Either the newsgatherer must suffer an enhanced chance of an adverse verdict for damages for defamation (because all allusions to the truth of the subject information have been snatched away by the trial court) or commit the intentional tort of breach of the confidence the source vested in the newsgatherer not to reveal the source's identity. [4]

Furthermore, since Jones concedes that Reporters were neither employees nor otherwise agents of WND/Hagelin, it will become the law of Tennessee that one who disseminates news stories, by posting them on an internet website, vicariously must suffer the same penalty as the newsgatherer, if the disseminator disseminates a news story with attribution to a confidential source whom the newsgatherer (not the disseminator) refuses to disclose.

[4] This Court has ruled that a newsgatherer who breached the confidence of a confidential source, by revealing the source's identity, can be held liable in damages to the confidential source. ***Cohen v. Cowles Data Company***, 501 U.S. 663 (1991).

And, this is so even though the disseminator does not have the identity of the confidential source to disclose.

If this is law, all President Nixon needed to do in order to retain his presidency was sue Woodward and Bernstein for defamation, force them into this Hobson's Choice and, by presumption, establish that the information attributed to the confidential source was false. The alternative for Woodward and Bernstein would have been to disclose the name of Deep Throat and suffer a breach of confidence judgment in favor of Deep Throat.

If the law in Tennessee is or becomes that, all that need be done to secure the name of a confidential source is file a defamation lawsuit against the newsgatherer. Investigative reporting throughout the United States, thereby, comes to a screeching halt.

Internet news disseminators have no way to keep news stories posted on the internet from being downloaded in Tennessee. Virtually all newspapers and other media post their news stories on internet websites. **Thus, the law of Tennessee becomes the law of the land,** if, as the trial court below decided and the court of appeals and supreme court refused to review an earlier interlocutory appeal, the law is that Tennessee has *in personam* jurisdiction over the dissemination by posting in a foreign state, if downloaded in Tennessee and is claimed to have defamed a Tennessee resident in Tennessee.

Thus, unless there is protection under the First Amendment that is universally applicable in the United States, investigative reporting by every newsgatherer in the United States can be controlled by any state acting unilaterally and even in complete discord with every other state. **The public policy implications here are phenomenal.**

If the holding of the court of appeals below can be presented to this Court and escape reversal, ***Bose*** (along with its predecessor, e.g., ***New York Times v. Sullivan***, *supra* at 18, and its progeny) and the ***McFarlane*** case and cases following ***McFarlane*** are now only paper tigers able to be easily ignored by the simple expedient of declaring that there is no privilege that ever permits non-disclosure of a newsgatherer's confidential source in a civil defamation case. It would be hard to dream up a more onerous and pervasive infringement of the First Amendment freedom press. The ruling below requires zero proof to overcome or to weigh against the newsgatherer's First Amendment privilege of nondisclosure. Rather, **the court of appeals flatly rules that no such privilege exists in a civil defamation case.**

This Court, to protect the public interest in free-flowing access to news at a heavy price to public figure-plaintiffs in civil defamation suits, has repeatedly ruled that the First Amendment makes it extraordinarily difficult for a public figure to obtain a judgment in such a civil defamation suit.

All of the public policy this Court has so assiduously declared will go up in flames if what was below decided can occur without this Court intervening to reverse.

Bose stated as clearly as can be said that a false and defamatory statement, combined with a trial court's unquestioned finding of fact that the publisher's sworn testimony that the publisher believed the false and defamatory statement to be true at the time of publication is not clear and convincing proof that the publisher published with actual malice and/or reckless disregard. Something more is required. It makes no difference if Tennessee's law of evidence would yield a different conclusion because the controlling rule emanates from the First Amendment as pronounced by this Court.

If not reversed, in Tennessee, the falsity of information gathered by Reporters from a confidential source is established by what, essentially, amounts to a presumption of falsity, if Reporters choose not to disclose the identity of the source--no further questions asked. More importantly, by the terms of the Strike Order, neither Reporters nor WND/Hagelin can tell the jury that whether the information attributed to the confidential source is true or not true, they had reason to believe the information was true.

The undisputed evidence of record below is that Reporters were never employees of WND and that the news was gathered and the stories written before WND ever even knew Reporters, save only by reputation.

The best Jones could do was a motion claiming that WND was vicariously liable by ratification by WND's dissemination with the attribution to a confidential source. The trial court never ruled on the ratification motion, but it has put beyond doubt that a publisher cannot be vicariously liable to a public figure in a defamation case.[5]

The court of appeals, apparently for no reason other than that WND posted the news stories on its website, declared WND to be the principal and the employer of Reporters. The fact that it is undisputed that WND/Hagelin have no knowledge as to the identity of the confidential source was of no consequence to the court of appeals.

CONCLUSION

First Amendment protection of confidential news sources is crucial to the newsgathering process on a nationwide basis. This protection serves the public interest by fostering an independent and aggressive check against unhealthy secrecy in government that breeds corruption in high places. Without newsgatherers being able to invite reliable sources to vest confidence in the newsgatherer's commitment not to divulge the source's identity, the healing rays of sunshine go dark and the festering that darkness produces multiplies.

Nothing short of a First Amendment right applicable from coast-to-coast and border-to-border is able to keep the sunshine aglow. Anything less gives vitality to the

---

[5] ***McFarlane,*** *supra at 19*, 74 F.3d at 1303.

repression that comes from rulings like those below that, in practical effect, become the standard for the nation. In this day and age, it is impossible to put information in the pipeline (internet) anywhere and keep it from reaching Tennessee.

Tennessee's shield statute, as it literally reads and as applied by the courts below, subordinates and subverts the protection that operates as a barrier necessary to uphold one of the most cherished safeguards that citizens have to maintain the health of a democratic form of government. In disregard for the First Amendment, the rulings of the courts below summarily shut down this system of checks and balances so that citizens nationwide are cut off from critical news and information.

How much corruption in the last 50 years would have continued to infect our nation had there existed a rule like that which controlled the courts below? The answer is all of the corruption except that which was revealed by an informant who was willing to suffer the reproach that comes with being the whistleblower on power brokers.

So, how much? Precious little.

APPENDIX

SUPREME COURT OF TENNESSEE FILINGS:

Order Denying Application for
Permission to Appeal,
filed 02/26/07 ..... A1-A1

Appeals As of Right, According
to Tennessee Code Annotated §24-1-208
(c)(3)(C), or, Alternatively, Rule 11
Application for Permission to Appeal,[Page 1]
filed 11/28/06 ..... B1-B2

Application Under Rule 11 for
Permission to Appeal,[Excerpt]
filed 11/21/06 ..... C1-C2

COURT OF APPEALS OF TENNESSEE FILINGS:

Order Denying Petition for Rehearing,
filed 09/28/06 ..... D1-D1

Order Denying Petition for Rehearing,
filed 09/25/06 ..... E1-E1

Petition of Tony Hays and
Charles C. Thompson, II to Rehear,[Excerpt]
filed 07/24/06 ..... F1-F3

Appellees Petition to Rehear,[Excerpt]
filed 07/21/06 ..... G1

Order of Dismissal,
filed 07/11/06 ..... H1-H3

APPENDIX, Continued:

Order,
filed 04/18/06 ..... I1-I1

Affidavit of Lizabeth Hale,[Excerpt]
filed 04/11/06 ..... J1-J3

Brief of the State of Tennessee,[Excerpt]
filed 04/11/06 ..... K1-K3

Order,
filed 01/17/06 ..... L1-L1

Notice of Tony Hays and
Charles C. Thompson, That a
Copy of Their Brief Has Been
Served Upon the Honorable
Paul G. Summers, Attorney
General of Tennessee,
filed 12/01/05 ..... M1-M2

Excerpt of Brief of Tony Hays and
Charles C. Thompson, II, [Excerpt]
filed 10/03/05 ..... N1-N4

Notice of Appeal,
filed 04/25/05 ..... O1-O3

CIRCUIT COURT OF HARDIN COUNTY TENNESSEE FILINGS:

Notice of Defendants',
Worldnetdaily.com and
Rebecca Hagelin, of Questions
of Law Brought up for Review
on Appeal,[Excerpt]
filed 04/22/05 ..... P1-P3

APPENDIX, Continued:

Order Granting Plaintiffs Motion *In Limine,*
filed 04/08/05 ..... Q1-Q3

Affidavit Worldnetdaily.com,[Excerpt]
filed 07/29/04 ..... R1-R7

Worldnetdaily.com's Response
in Opposition to Plaintiff's
Motion *In Limine* to Strike Defenses,[Excerpt]
filed 06/11/04 ..... S1-S4

Response to Opposition to
Plaintiffs Motion *In Limine*
to Strike Defense,[Excerpt]
filed 06/10/04 ..... T1-T12

Order on Motion of Defendants
For Partial Summary Judgment,[Excerpt]
filed 06/01/04 ..... U1-U3

OTHER:

Brief for Amici Curai,[Excerpt]
filed 12/07/06 ..... V1-V11

Undisputable Facts by Jones W1-W3

WND Supplement Response to
Jones' Interrogatory Number 34 ..... X1-X2

Series of Articles Y1-Y5

APPENDIX, Continued:

STATUTES:

TCA § 24-1-208 ..... Z1-Z2

IN THE SUPREME COURT OF TENNESSEE AT JACKSON

CLARK JONES v. TONY HAYS, ET AL

Circuit Court for Hardin County No. 3414

No. W200S-00991-SC-RII-CV

ORDER

Tony Hays and Charles C. Thompson, II have filed an application for permission to appeal. WorldNetDaily.com, Inc. and Rebecca Hagelin have filed what they style as an appeal as of right under Tenn. Code Ann. § 24-1-208 (c)(3)(C) or, alternatively, an application/appeals for permission to appeal. After due consideration, it is ordered that all applications are denied.

Clark Jones has filed a motion to dismiss the above-referenced applications for permission to appeal filed by Hays and Thompson and WorldNetDaily.com, Inc. and Hagelin. Because of the Court's actions on those applications, the motion as to all four parties is denied as moot.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

CLARK JONES,

Plaintiff/Appellee,

v.

No. W2005-00991-SC-R11-CV
Hardin County Circuit Court, No.3414

TONY HAYS and
CHARLES C. THOMPSON, II,

Defendants/Appellants,

and

WORLDNETDAILY.COM and
REBECCA HAGELIN,

Defendants/Appellees

APPEAL AS OF RIGHT, ACCORDING TO TENNESSEE CODE ANNOTATED §24-1-208(c)(3)(C), OR, ALTERNATIVELY, RULE 11 APPLICATION FOR PERMISSION TO APPEAL BY APPELLEES, WORLDNETDAILY.COM/HAGELIN

LARRY E. PARRISH, P.C.
Attorneys for Defendants/Appellees

By:/s/ Larry E. Parrish

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IN THE SUPREME COURT OF TENNESSEE

CLARK JONES,

Plaintiff/Appellee,

Vs.

No.W2005-00991-
SC-R11-CV

TONY HAYS,
CHARLES C. THOMPSON,
II REBECCA HAGELIN,
WORLD NET DAILY.COM., INC.,

Defendants/Appellants,

APPLICATION UNDER RULE 11 FOR PERMISSION TO APPEAL BY FREELANCE JOURNALISTS TONY HAYS AND CHARLES C. THOMPSON, II

Sam F. Cole, Jr., #008144
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Attorney for Tony Hays, and
Charles C. Thompson, II

Gary G. Kreep, Attorney
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932 D Street, Suite 3
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Attorney for Tony Hays, and
Charles C. Thompson, II

QUESTIONS PRESENTED FOR REVIEW

1) The Court of Appeals failed to even acknowledge the Applicants "Qualified" Newsmen's Privilege under the First Amendment, let alone remedy the trial court's stripping them of such protection.

2) The Court of Appeals similarly failed to acknowledge or protect the Applicants "Qualified" Newsmen's Privilege under the Tennessee Constitution.

3) The Court of Appeals let stand an unconstitutional application of T.C.A. 24-1-208(b) which created an unlawful irrebuttable presumption that the Applicants' allegedly defamatory statements are false.

FACTS RELEVANT TO THE QUESTIONS PRESENTED

The Hardin County Circuit Court action of Clark Jones against the Applicants is for alleged defamation claimed by him over a number of articles by the Applicants that were posted on the internet news site, WorldNetDaily.com., concerning the campaign of Vice President Albert Gore, Jr. to become President of the United States in the year 2000. Clark Jones was a major fund raiser for that campaign. He was found by the trial court to be a "public figure." Discovery had not been completed at the trial

IN THE COURT OF APPEALS OF TENNESSEE FOR
THE WESTERN SECTION
AT JACKSON

CLARK JONES v. TONY HAYS, ET AL.

Circuit Court for Hardin County No. 3414

No. W200S-00991-COA-R3-CV

ORDER

Appellants, WorldNetDaily.com and Rebecca Hagelin, have filed a petition for rehearing pursuant to Rule 39(a) of the Tennessee Rules of Appellate Procedure.

Upon due consideration, the petition for rehearing is denied and the costs incident thereto are taxed to petitioners, WorldNetDaily.com and Rebecca Hagelin, for which execution may issue if necessary.

/s/ Alan E. Highers
ALAN E. HIGHERS, JUDGE

/s/ David R. Farmer
DAVID R. FARMER, JUDGE

/s/ William H. Inman
WILLIAM H. INMAN,
SPECIAL JUDGE

IN THE COURT OF APPEALS OF TENNESSEE FOR
THE WESTERN SECTION
AT JACKSON

CLARK JONES v. TONY HAYS, ET AL.

Circuit Court for Hardin County No. 3414

No. W200S-00991-COA-R3-CV

ORDER

Appellants, Tony Hays and Charles Thompson, have filed a petition for rehearing pursuant to Rule 39(a) of the Tennessee Rules of Appellate Procedure.

Upon due consideration, the petition for rehearing is denied and the costs incident thereto are taxed to petitioners, Tony Hays and Charles Thompson, for which execution may issue if necessary.

/s/ Alan E. Highers
ALAN E. HIGHERS, JUDGE

/s/ David R. Farmer
DAVID R. FARMER, JUDGE

/s/ William H. Inman
WILLIAM H. INMAN,
SPECIAL JUDGE

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

CLARK JONES,

Plaintiff/Appellee,

Vs. No.W2005-00991-COA-R3-CV

TONY HAYS,
CHARLES C. THOMPSON, II,
REBECCA HAGELIN,
WORLDNETDAILY.COM, INC.,

Defendants/Appellants,

PETITION OF TONY HAYS AND CHARLES C. THOMPSON, II TO REHEAR

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Counsel for Tony Hays, and
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United States Justice Foundation
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Tel. 760-741-8086
Counsel for Tony Hays, and
Charles C. Thompson, II

May it please the court:

Appellants, Tony Hays and Charles C. Thompson, II, petition the court for rehearing in this case on which the court submitted an Order for filing on July 11, 2006 without any Opinion. TRAP Rule 38 provides that "The clerk of the appellate court shall prepare and enter the judgment following receipt of the opinion of the appellate court unless the court orders otherwise." Appellants have never been sent a copy of any order of the court that the court has ordered "otherwise." Insofar as they have been able to determine no such order exists, nor has the clerk entered any judgment in this case. The Appellants have accordingly been unable to cite to any of the four (4) reasons of TRAP Rule 39 for rehearing which would be found in the court's opinion. This is brought about from the current procedural hiatus created in this case by the court. Indeed, the order submitted by the court on July 11,2006 does not even address the three Issues Presented For Review by Appellants, Hays and Thompson. Appellants

would trust that their three Issues would be addressed in an opinion of the court. They earnestly and respectfully urge the court to overturn and correct the resulting procedural misfit created by the court that is contrary to the Rules of Appellate Procedure.

Respectfully submitted,

/s/ Sam F. Cole, Jr.
Sam F. Cole, Jr. #008144
100 N. Main Bldg., Suite 2519
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Tel. 901-525-7648
Counsel for Tony Hays, and
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Counsel for Tony Hays, and
Charles C. Thompson, II

CERTIFICATE OF SERVICE

A copy of the foregoing Petition has been sent by regular U.S. First Class Mail, postage prepaid, on this 20th day of July, 2006 to:

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

CLARK JONES,

Plaintiff/Appellee

v. No. W2005-00991-COA- R3-CV

TONY HAYS and
CHARLES C. THOMPSON, II,

Defendants/Appellant,

and

WORLDNETDAIL Y.COM and
REBECCA HAGELIN,

Defendants/Appellees.

APPELLEES' PETITION TO REHEAR

COME NOW appellees, WorldNetDaily.com, Inc. and Rebecca Hagelin (hereinafter "WND"), in exercise of their right stated in ***Tennessee Rules of Appellate Procedure***, Rule 39(a), and file this petition to rehear this Court's ruling in the July 11, 2006 order dismissing this appeal(hereinafter "Order").

IN THE COURT OF APPEALS OF TENNESSEE AT JACKSON

CLARK JONES v. TONY HAYS, ET AL.

Circuit Court for Hardin County
No. 3414

No. W200s..00991-COA-RJ-CV

ORDER

This is an action for damages for defamation occurring over a period of time when Senator Gore was a candidate for President. The Plaintiff is a resident of Hardin County, Tennessee, and was active in Senator Gore's Presidential campaign. The Defendants Hays and Thompson were freelance rep0l1ers engaged by the Defendant WorldNetDaily.com, Inc. [WND] to write a series of articles about the Plaintiff's alleged activities which were published, with extensive notoriety, by WND, and were *prima facie defamatory.*

The trial judge ruled that Tennessee had the requisite *in personam* jurisdiction, that the Plaintiff was a public figure which required him to prove malice on the part of the Defendants, and that the asserted defense of constitutional

and statutory privilege should be stricken because the Defendants Thompson and Hays, agents of WND, refused to reveal the identity of their alleged confidential sources.

Tennessee Code Annotated section 24-1-208(a) provides that no news gatherer shall be required to disclose to any Tennessee court the source of any information procured for publication. Section 208(b) provides that 208(a) does not apply "with respect to the source of any allegedly defamatory information in any case where the defendant in a civil action for defamation asserts a defense based on the source of such information."

Section 208(c)(1) provides that a person seeking information or the source thereby protected under this section may apply for an order divesting such protection.

Section 208(c) (3)(A) provides that "[a]ny order of the trial court may be appealed to the court of appeals in the same manner as other civil cases" and 208(c)(3)(B) provides that "[t]he execution of or any proceeding to enforce a judgment divesting the protection of this section shall be stayed pending appeal ... in accordance with Rule 3 of the Tennessee Rules Appellate Procedure ... "

The Plaintiff did not seek "an order divesting such protection" under 208(c)(1)~ and since no privilege exists

for the non-disclosure of information Of sources in a civil action involving defamation the procedure for divesting the privilege prescribed by 208(c)(1), and that the Defendants have no right to appeal a decision which neither grants nor denies disclosure in face of the asserted privilege, because none existed to be divested, the appeals of Hays and Thompson, together with the appeals of WND and Hagelin, are dismissed. Costs are assessed to Hays, Thompson, WND and Hagelin and their sureties.

/s/ Alan E. Highers
ALAN E. HIGHERS, JUDGE

/s/ David Farmer
DAVID FARMER, JUDGE

/s/ William H. Inman
WILLIAM H. INMAN,
SENIOR JUDGE

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON

CLARK JONES

v.

TONY HAYS, ET AL.

Circuit Court for Hardin County
No. 3414

No. W2005-00991-COA-R3-CV

ORDER

The State of Tennessee has filed a motion in which it requests that this Court accept the brief it submitted to the Clerk of this Court on April 12, 2006. Although we do not condone the State of Tennessee's failure to comply with the clear and unambiguous time requirements of the Tennessee Rules of Appellate Procedure, for good cause shown, we will accept the brief received by the Clerk of this Court on April 12, 2006. **It is SO ORDERED**.

/s/ Alan E.Higher
ALAN E. HIGHERS, J.

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN DIVISION AT JACKSON

CLARK JONES,

Plaintiff/Appellee,

v. No. W2005-00991-COA-R3-CV
TONY HAYS,
CHARLES C. THOMPSON,
II, REBECCA HAGELIN,
WORLD NET DAILY.COM, INC.,

Defendants/Appellants,

AFFIDAVIT OF LIZABETH A. HALE

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

I, Lizabeth A. Hale, being first duly sworn, hereby depose and aver as follows:

1. I am an Assistant Attorney General in the Law Enforcement and Special Prosecutions Division of the Attorney General's Office. I

have been assigned primary responsibility for representation of the State in this appeal.

2. On Thursday, March 30, 2006, my office received a copy of Appellant's Brief and notice that Oral Argument was set for April 18, 2006. The letter from Appellant's counsel stated that he had sent us a copy of the brief previously on December 1, 2005.

3. After a review of the files in my division, I was unable to locate the copy that had been sent to us in December. It has apparently been misplaced.

4. As the brief had been misplaced, my office did not submit a brief in this matter within the time allowed for a responsive party to file a brief.

5. Filing this brief late is not intended to prejudice either Appellants or Appellees, nor intended as disrespect to the court.

FURTHER AFFIANT SAITH NOT.

/s/ Lizabeth A. Hale

LIZABETH A. HALE
Assistant Attorney General

Sworn to and subscribed before me, this the 11th day of April, 2006.

/s/ Lizabeth A. Hale
LIZABETH A. HALE
Assistant Attorney General

My Commission Expires: September 19, 2009

CERTIFICATE OF SERVICE

I hereby certified that I sent a true and correct copy of the forgoing document via United States Mail, Postage Prepaid, to:

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Memphis, TN 38103

Gary G. Kreep
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Escondido, CA 92027

J. Houston Gordon
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Covington, TN 38109

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN DIVISION AT JACKSON

CLARK JONES,

Plaintiff /Appellee,

v. No.W2005-00991-COA-R3-CV

TONY HAYS,
CHARLES C. THOMPSON, II,
REBECCA HAGELIN,
WORLD NET DAILY.COM, INC.,

Defendants/Appellants,

BRIEF OF THE STATE OF TENNESSEE

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Oral Argument Requested

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IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON

CLARK JONES
v.
TONY HAYS, ET AL.

Circuit Court for Hardin County
No. 3414

No. W200S-00991-COA-R3-CV

ORDER

The matter currently pending is appellee Clark Jones's motion requesting that this appeal be dismissed. The Appellants and the other Appellees oppose this motion. At this time, the Court is not inclined to dismiss this appeal. Accordingly, the motion currently pending is denied. We note, however, that the motion to dismiss raises significant issues, and the denial of the motion does not prevent the parties from addressing on appeal the issues raised in the motion. It is **SO ORDERED**.

/s/W. Frank Crawford
W. FRANK CRAWFORD, P.J., W.S.

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN DIVISION AT JACKSON

CLARK JONES,

Plaintiff/Appellee,

v. No. W2005-00991-COA-R3-CV

TONY HAYS,
CHARLES C. THOMPSON,
II REBECCA HAGELIN,
WORLD NET DAILY.COM., INC.,

Defendants/Appellants,

NOTICE OF TONY HAYS AND CHARLES C. THOMPSON THAT A COPY OF THEIR BRIEF HAS BEEN SERVED UPON THE HONORABLE PAUL G. SUMMERS, ATTORNEY GENERAL OF TENNESSEE

Comes the Appellants, Tony Hays and Charles C. Thompson, II, pursuant to TRAP Rule 32, and hereby give Notice that a copy of their Appellate Brief in this case has

been sent to the Honorable Paul G. Summers, Attorney General of the State of Tennessee, Office of the Attorney General, P.O. Box 20207, Nashville, Tennessee 37202-0207 by regular U.S. Mail, postage prepaid, on this 1st day of December, 2005.

/s/ F. Cole, Jr.
F. Cole, Jr., #00814
100 N. Main Building, Suite 2519
Memphis, TN. 38103
Tel. 901-525-7648
Counsel for Tony Hays,
and Charles C. Thompson, II

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN DIVISION AT JACKSON

CLARK JONES,

Plaintiff/Appellee,

V. No.W2005-00991-COA-R3-CV

TONY HAYS,
CHARLES C. THOMPSON, II,
REBECCA HAGELIN,
WORLD NET DAILY. COM, INC.,

Defendants/Appellants,

BRIEF OF TONY HAYS AND CHARLES C. THOMPSON, II

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Escondido, CA. 92027
Tel. 760-741-8086
Counsel for Tony Hays, and
Charles C. Thompson, II

-ORAL ARGUMENT REQUESTED-

Deposition of Tony Hays; (T.R. 14, pp. 28-174); Deposition of Janice Marie Walker; (T.R. Vol. 26, pp. 68-146); Deposition of Gary Wilson, (T.R. Vol. 28, pp.1-2), Deposition of Larry Phelps, (T.R. Vol. 28, pp.l-2, 47-48,63-66); Deposition of Bob Shutt, T.R. Vol. 29, pp.l22-123; Deposition of Rev. Randy Isbell, (T.R.Voi. 31, pp. 1-135, & T.R. Vol. 32, pp. 36,55); (T.R. VoL 37, pp. 83-84, Affidavit of Tony Hays).

-ARGUMENT-

Issue Number One

The trial court summarily denied the Appellants' qualified privilege under the First Amendment to the U.S.

Constitution and Article 1, Section 19 of the Constitution of Tennessee from their refusal to reveal their sources of news to the Plaintiff.

In **Branzburg v. Hayes, 408 U.S. 665,92 S.Ct. 2646, 33 L.Ed.2d 626 (1972)**, the Supreme Court held that a journalist does not have an absolute privilege under the First Amendment to refuse to disclose news sources to a grand jury investigating criminal conduct. In its 4-1-4 decision, the court in **Branzburg** limited its holding to the question of a reporter's refusals to produce information to a grand jury called by the government to investigate criminal activity. In his concurring opinion, Justice Powell emphasized "the limited nature of the Court's holding," **408 U.S. at 709, 92 S.Ct. at 2671**. The U.S. Supreme Court has never considered whether reporters can be forced to turn over names of news sources outside the context of a legitimate criminal investigation. In **First Natl. Bank v. Bellotti, 435 U.S. 765,781 (1978)** the court stated that the press has "a special and constitutionally recognized role" in informing the public, offering criticism, and providing a forum for discussion and debate. Since **Branzburg**, nine of the twelve United States Courts of Appeal that have considered the issue have held that there is a qualified privilege against compelled disclosure of news sources possessed by a journalist; **Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583,583 (1st Cir. 1980)** reversing order to compel discovery based upon the

reporter's privilege; **United States v. Burke, 700 F.2d 70, 77 (2nd Cir. 1983, Cert. denied 464 U.S. 816)**, reporter's privilege applies to civil cases; **Zerilli v. Smith, 656 F.2d 705,712 (D.C.Cir. 1981)**, reporter's First Amendment privilege should be readily available in civil cases; **Riley v. City of Chester, 612 F.2d 708 (3rd Cir. 1979)**, reversing contempt order based on reporter's privilege; **United States v. Cuthbertson, 630 F.2d 139 (3rd Cir.1980, cert. denied, 449 U.S. 1126)**, compelled disclosure may undercut public policy favoring free flow of information to the public that is the foundation for the privilege; **Larouche v. NBC, Inc., 780 F.2d 1134 (4th Cir. 1986)**, order affirmed denying motion to compel in defamation action based on reporter's privilege; **Miller v. Transamerican Press, Inc., 621 F.2d 721, 726 (5th Cir. 1980)**, recognizing reporter's privilege in defamation action though finding privilege overcome; **Cervantes v. Time, Inc., 464 F.2d 986,992-93 (8th Cir. 1972)**, recognizing that reporter's privilege may apply in civil cases; **Shoen v. Shoen,S F.3d 1289,1296 (9th Cir. 1993)**, privilege upheld when requesting party has not demonstrated they have exhausted all other reasonable means for obtaining the information; **Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 437-438 (10th Cir.1977)**, reversing order to compel discovery in civil action based upon reporter's privilege; **Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981)**, adopting 5th Circuit's decisional law; **United States v.**

NOTICE OF APPEAL

Appeal to the:

▫ Supreme Court	▫ Court of Criminal Appeals
▫ Worker's Comp Case	▫ Capital Case
X Court of Appeal	▫ Defendant is indigent

Appealed from:

X Circuit	▫ Chancery
▫ Probate	▫ Juvenile

▫ Criminal (▫ Misdemeanor ▫ Felony)

▫ General Sessions 0 Board of Claims

Style of the Case:

Clark Jones v.

Tony Hays, eta al

County: Hardin Trial Court No.: 3414

Special Trial Judge: Charles O. McPherson

File Date of Judgment Appeal: 4/8/05

Bond on appeal is:

X Filed ▫ Indigent ▫ Not required ▫ Cash bond

If not required, state reason: _____

Appellant(s)
[party(ies) initiating the appeal]

Appellee: Tony Hays At Trial: ▫Plaintiff ☒Defendant
Party's Address: 951 Airways Blvd., Savannah, TN. 38372
Appellant: Charles C. Thompson, II
At Trial: ▫Plaintiff ☒Defendant
Party's Address: 1808 Briar Ridge Court, McLean, VA 22101
Appellant:_____ At Trial: ▫Plaintiff ▫Defendant
Party's Address: _____

Appellant(s)
[party(ies) initiating the appeal]

Appellee: Clark Jones At Trial: ☒Plaintiff ▫Defendant
Attorney's Address: 114 W. Liberty Ave., Covington, TN 38019-0846
Appellee : J. Houston Gordon, Esq.& Curtis F. Hooper, Esq.
At Trial: ☒Plaintiff ▫Defendant
Attorney's Address: 404 W. Main, Savannah, TN. 38372
At Trial: ▫Plaintiff ▫Defendant
Attorney's Address: _____BPR# _____

4/22/05 /s/ Samuel F. Cole, Jr.
Date Signature of Attorney or Pro Se Party

#008144
Attorney's BPR#

Address of Attorney or Pro Se Party

Sam F. Cole, Jr., 100 N. Main Bldg., Suite 2519, Memphis, TN. and
Atty. Gary G. Kreep, U.S. Justice Foundation,
2091 E. Valley Parkway, Suite 1~C, Escondido, CA. 92027

IN THE CIRCUIT COURT OF HARDIN COUNTY, TENNESSEE AT SAVANNAH

CLARK JONES,

Plaintiff

v.

No. 3414

Jury Demanded

TONY HAYS, ET AL.

Defendants.

NOTICE OF DEFENDANTS', WORLDNETDAILY.COM AND REBECCA HAGELIN, OF QUESTIONS OF LAW BROUGHT UP FOR REVIEW ON APPEAL, PURSUANT TO TENNESSEE RULES OF APPELLATE PROCEDURE, RULE 13(a)

COME NOW, defendants/appellees, WorldNetDaily.com and Rebecca Hagelin (hereinafter "**WND/Hagelin**"), in light of the appeal initiated on April 15, 2005 by defendant, Tony Hays, pursuant to **Tennessee Rules of Appellate Procedure**, Rule 3{a}, statutorily permitted by **Tennessee Code Annotated** §24-1-208(c}(3)(A) and (B), and give notice that, pursuant to **Tennessee Rules of Appellate Procedure**, Rule

13(a), WND/Hagelin will bring up for review in that appeal, the following questions of law:

1. Is the order, signed by the trial court on July 25, 2002 and entered by the clerk of the trial court on July 31, 2002, entitled "Order Granting In Part And Denying Specified Motions Of Plaintiff And Defendants, WorldNetDaily.com And Rebecca Hagelin, And Defendant Charles Thompson To Dismiss" (hereinafter **"WND/Hagelin Dismissal Order"**), as a matter of law, erroneous and reversible?
2. Is the order, signed by the trial court on March 18, 2005 and entered by the clerk of the trial court on March 22, 2005, entitled "Order Denying World Net Daily.Com/ Hagelin's Motion for Summary Judgment/ Malice/Jurisdiction/ Conspiracy/False Light" (hereinafter **"WND/HAGELIN SMJ** Order"), as a matter of law, erroneous and reversible?
3. Is the order, signed by the trial court on March 23, 2005 and entered by the clerk of the trial court on April 8, 2005, entitled "Order Granting Plaintiff's Motion *in Limine* To Strike Defenses To Defamation Asserted By Defendants Relying On Unnamed And Undisclosed Sources Or, In The Alternative,

To Compel Defendants, Tony Hays, Charles C. Thompson, II To Disclose Sources" (hereinafter **"Strike Order"**), as a matter of law, erroneous and reversible?

4. Does the Strike Order erroneously preclude WND/Hagelin from asserting defenses that WND/Hagelin are entitled to assert irrespective of whether co-defendants, Tony Hays and/or Charles C. Thompson, II, disclose or refuse to disclose their confidential sources?

Respectfully Submitted,

LARRY E. PARRISH, P.C.

By: /s/ Larry E. Parrish

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6075 Poplar Avenue
Suite 420
Memphis, Tennessee 38119
(901) 767-8000

CERTIFICATE OF SERVICE

IN THE CIRCUIT COURT OF HARDIN COUNTY, TENNESSEE AT SAVANNAH

CLARK JONES,
Plaintiff,

vs.

TONY HAYS, et al.,
Defendants.

ORDER GRANTING PLAINTIFF'S MOTION IN LIMINE TO STRIKE DEFENSES TO DEFAMATION ASSERTED BY DEFENDANTS RELYING ON UNNAMED AND UNDISCLOSED SOURCES OR, IN THE ALTERNATIVE, TO COMPEL DEFENDANTS, TONY HAYS, CHARLES C. THOMPSON, II TO DISCLOSE SOURCES

THIS CAUSE CAME on to be heard on the 30th day of August, 2004 and again on the 10th day of March, 2005, before the Honorable Charles O. McPherson, upon of Plaintiffs Motion *In Limine* to Strike Defenses to Defamation Asserted by Defendants Relying on Unnamed and Undisclosed Sources or, in the Alternative, to Compel Defendants, Tony Hays, Charles C. Thompson, II, and after

reviewing the memoranda and hearing arguments of the parties.

It appearing to the court that T.C.A. §24-1-208 is quite clear and that the defendants Hays and Thompson have continued, without equivocation, to assert their claim of privilege as to unnamed sources and have refused to answer questions as to the identity of said sources.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that each and all defenses of the defendants based upon information received from any unnamed source are hereby stricken and Defendants are hereby barred from relying on information received from unnamed and unidentified sources in this case as the basis for any defense herein.

SO ORDERED this the 23rd day if March, 2005.

/s/ Honorable Charles O. McPherson
HONORABLE CHARLES O. McPHERSON

APPROVED FOR ENTRY:

/s/ J. Houston Gordon
J. HOUSTON GORDON
Attorney for Plaintiff

APPROVED AS TO FORM ONLY:

/s/ Sam Cole
SAM COLE
Attorney for Defendants,
Charles C. Thompson, II and Tony Hays

IN THE CIRCUIT COURT OF HARDIN COUNTY, TENNESSEE AT SAVANNAH

CLARK JONES,

Plaintiff

v. No.3414
Jury Demand

TONY HAYS, ET AL.

Defendants.

AFFIDAVIT OF WORLDNETDAILY.COM

STATE OF VIRGINIA
COUNTY OF FAIRFAX

COMES NOW plaintiff, WorldNetDaily.com(hereinafter "**WND**"), by and through its President, Joseph Farah, and states that WND is qualified, to the best of WND's knowledge and belief, to give testimony in the courts of the United States and of Tennessee. Having so stated, WND, by said President, makes oath to the truth and accuracy of the information below set out;

1. In 2000, WND was an online Internet news source.
2. In 2000, WND made news available by news

articles posted in Oregon each day on the WND website.

3. In 2000, any person (without restriction), located any place in the world, could access, for no charge, the news articles posted by WND in Oregon, if the person had an Internet connected computer and the acumen to locate the WND website.

4. In 2000, WND did not directly transmit, via e-mail or otherwise, the news articles posted in Oregon by WND.

5. In 2000, the only means by which WND communicated the news articles was by posting, in Oregon, the news articles on the WND website.

6. In 2000, once the news articles were posted in Oregon on the WND website throughout the world immediately the news articles became accessible.

7. In 2000, the news articles posted by WND in Oregon targeted no audience because of the geographical location of the audience or based on any other criteria distinguishing one person in the world from another person.

8. In 2000, the news articles posted in Oregon were accessible to any person in the world at the exact same time so that no person was

given any preference over any other person in the world either as to the time or the way the posted news articles were accessible.

9. In 2000, any person anywhere in the world who had the acumen and computer technology and chose to access the news articles posted by WND in Oregon, without further permission from WND and without the necessity for paying, could copy the news articles by any means available to the person, including, but not limited to, downloading the news articles onto a computer disk or onto any other medium.

10. In 2000, WND had available to it no technology by which WND could determine the identity of any person from the fact that the person accessed the WND website.

11. In 2000, WND had no technology by which WND could identify anything about the person's location from the fact that the person accessed the WND website.

12. In 2000, WND published a periodic magazine (hereinafter "WND Magazine"), in print format, available to subscribers (hereinafter "Subscribers") who paid to WND $36.00 per year.

13. In 2000, WND solicited, by posting in Oregon

on the WND website, a solicitation for persons to become Subscribers.

14. In 2000, if a person responded to the WND solicitation to become a Subscriber, WND collected, in Oregon, the subscription price and, thereafter, periodically mailed to the Subscriber a copy of the WND Magazine.

15. On January 1, 2000, there were, worldwide, approximately one thousand one hundred seventy-one (1171) Subscribers and, on December 31.2000, there were, worldwide. approximately one thousand two hundred nine (1209) Subscribers.

16. On January 1,2000, there were twelve (12) Subscribers (1% of total) who provided WND a mailing address in Tennessee, and, on December 31, 2000, there were twelve (12) Subscribers (.09% of total) who provided WND a mailing address in Tennessee.

17. On January 1, 2000, there were zero (0) Subscribers who provided WND a mailing address in Adamsville, Crump, Saltillo or Savannah, Tennessee, and, on December 31, 2000, there were zero (0) Subscribers who provided WND a mailing address in Adamsville, Crump, Saltillo or Savannah, Tennessee.

18. In 2000, persons who accessed the WND website posted in Oregon could respond to the solicitations of WND to become a Subscriber by communicating their intention to WND by clicking on the appropriate icon on the WND homepage.

19. In 2000, WND offered for sale certain products/items (e.g., books, videotapes) to any person who placed an order and remitted payment to WND in Oregon.

20. In 2000, any person who accessed the WND website posted in Oregon and wished to purchase the use of an offered item/product could make purchase by clicking on the appropriate icon on the WND website and, thereby, communicate the order to WND in Oregon.

21. Neither in 2000 nor at any time before or after 2000 has WND had any employees or agents of any other kind located at any place in Tennessee or dispatched for a particular task by or for WND to any place in Tennessee.

22. Neither in 2000 nor at any time before or after 2000 has WND had an office, a mailing address or any contact point or contact person of any kind in Tennessee.

23. Neither in 2000 nor at any time before 2000

did WND contract any person to render any services of any kind to or for WND in Tennessee.

24. Neither in 2000 nor at any time before 2000 did WND have any affiliation, for business purposes, with any person (human or entity) in Tennessee.

25. Neither in 2000 nor any time before 2000 did WND have any creditors (including vendors) of any kind in Tennessee.

26. Neither in 2000 nor any time before 2000 did WND have any debtors (including vendees) in Tennessee.

27. Neither in 2000 nor any time before or after 2000 has WND had any owners or equity holders of any kind in Tennessee.

28. Other than purchasing the use of the news articles, specified in the responses of WND to the first set of interrogatories propounded by Clark Jones, more particularly, response to Interrogatory No.2, neither in 2000 nor at any time before 2000 did WND make any purchases in or from Tennessee.

29. Neither in 2000 nor any time before or after 2000 has WND been licensed to do business in Tennessee or in any locality in Tennessee.

30. Neither in 2000 nor any time before or after

2000 has WND had any benefit to gain, different in any way from what benefit WND has had to gain in states other than Tennessee or the remainder of the world, from or because a person located in Tennessee accessed the WND website posted in Oregon.

31. Neither in 2000 nor any time before or after 2000 has WND engaged in any marketing designed to increase the number of persons in Tennessee, distinct from any or all states other than Tennessee, who access the WND website posted in Oregon.

32. Neither in 2000 nor any time before has WND posted in Oregon any news articles concerning events reported to have occurred in Tennessee except information provided to WND by persons other than WND employees or agents.

33. Neither in 2000 nor any time before or after 2000 has WND had a designated agent for service of process in Tennessee.

34. Neither in 2000 nor any time before 2000 has WND ever done any business in Tennessee.

35. Neither in 2000 nor any time before or after 2000 has WND owned nor had any interest in any property (real or personal, corporeal or incorporeal) located in Tennessee.

36. Neither in 2000 nor any time before or after

2000 has WND maintained either a telephone subscription or an account of any kind, either in the name of WND or any other name, in Tennessee.

37. Neither in 2000 nor any time before 2000 have persons who accessed the WND website been able to use the WND computer, located in Oregon, as a host computer by which to interact with other persons.

38. Prior to WND acquiring from Mr. Hays/Mr. Thompson the news articles that are the subject of the instant lawsuit, Clark Jones was not known by WND to exist.

39. After WND acquired the news articles that are the subject of the instant lawsuit from Mr. Hays/Mr.Thompson, WND had no more knowledge of or about Clark Jones than what Mr. Hays/Mr. Thompson reported in the news articles verified by Mr. Hays/Mr. Thompson to be accurately reported from sources known by Mr. Hays/Mr. Thompson to be reliable.

40. All investigation, sourcing, interviewing and other fact-gathering for or related to the news articles that are the subject of the instant lawsuit were related to WND to have been done by Mr. Hays/Mr. Thompson.

41. In 2000 and before and after 2000, WND was

and is located, headquartered, domiciled and incorporated by and in Oregon and Delaware.

42. In and before 2000, WND's sale business transaction, involving a person thought by WND to be a of Tennessee, was purchasing the use of the news articles that are the subject of the instant case from Mr. Thompson/Mr. Hays and one article from Patrick Poole.

43. Neither in 2000 nor at any time before or after 2000 did WND have economic incentive to target Tennessee, as opposed to New York, California or India, to cause persons to choose to search out the WND website to read the news articles that are the subject of the instant lawsuit.

44. In 2000, WND, in Tennessee, did not advertise the existence of the WND website.

45. In neither 2000 nor before or after 2000 did WND ever tailor the WND Oregon website or news articles posted on it to appeal more to a Tennessee audience in comparison with an audience anywhere else located.

46. In 2000, visitors at WND's Oregon website could interact with the WND website only in the following ways:

    a. Purchasing products

    b. Purchasing advertising

c. Subscribing to publications

d. Subscribing to email lists

47. In 2000, WND did not initiate interaction with persons because the person accessed the WND website in Oregon solely to read news articles posted by WND in Oregon.

48. Neither in 2000 nor before 2000 has WND entered into contracts or other agreements with persons known by WND to be residents of Tennessee.

49. Neither in 2000 nor before or after 2000 did WND intend to cause injury to Clark Jones in Tennessee or any other place.

50. In 2000, WND estimates that it received 24 million unique visitors on the WND Oregon website of which the only ones that can be identified by the location of the person who initiated the hit are those placing an order, to become a Subscriber or to purchase an item/product, in which case the ordering person would provide an address.

51. Both before and after WND acquired from Mr. Hays/Mr. Thompson the news articles that are the subject of the instant lawsuit, WND neither had nor has ever had any subjective thoughts about Clark Jones, including, but not limited to, spite, ill-will, hatred, a desire for

vengeance or revenge or malice expressed by any other synonym, adjective or noun.

52. At no time before or after WND acquired from Mr. Hays/Mr. Thompson the news articles that are the subject of the instant lawsuit, has WND ever had any information that gave WND any reason to believe that either Mr. Hays or Mr. Thompson had or ever had had any subjective thoughts about Clark Jones, including, but not limited to, spite, ill-will, hatred, a desire for vengeance or revenge, or malice expressed by any other synonym, adjective or noun.

53. In posting in Oregon the news articles that are the subject of the instant lawsuit on the WND website, WND had no purpose or objective other than to report the information included in the news articles for consumption by any person, located anywhere in the world, who chose to access the WND website for the purpose of reading the subject articles, for whatever purpose, if any, such persons might have.

54. In posting in Oregon the news articles that are the subject of the instant lawsuit, WND did not, thereby, express any editorial opinion about the information reported in the news

articles and did not suggest what, if anything, a reader or any other person might wish to engage in or omit because of the information reported.

55. The news article posted on September 20, 2000 in Oregon includes the following:

- o p.3,¶11-**WorldNetDaily** asked Wallace ....
- o p.7. ¶ 52-Law enforcement officials told **WND** that Sweat, ...
- o p.7,¶58-A number of residents of Savannah told **WorldNetDaily** ....
- o p.7,¶59-[Clark Jones] told **WND**.
- o p.8,¶68-Clark Jones told **WND** ....
- o p.8,¶70-Jones ... when he spoke to **WND.**
- o p.10,¶90-LaFon told **WND** ....
- o p.11,¶102-Isbell told **WND** '" .
- o p.12,¶112-**WND** attempted twice to ask Carpenter ....
- o p.12,¶113-Carpenter was ordered not to talk to **WorldNetDaily** ....
- o p.13,¶126-TBI sources tell **WorldNetDaily** ....
- o p.13,¶128-vouchers obtained by **WorldNetDaily**
- o p.13,¶129-Wallace has ordered these

agents not to talk to **WND**.

- o p.14,¶132-**WND** made numerous attempts to talk to Roger Hughes.
- o p.14,¶136-two senior law enforcement sources told **WND** ....
- o p.14,¶139-Winkler refused to talk to **WND** ....
- o p.15,¶146-Two law enforcement sources told **WorldNetDaily** ....
- o p.15,¶150-Harmon talked to **WND** ....

56. In spite of the quoted references in the immediately preceding enumerated paragraph, WND never gathered or attempted to gather any of the information reported in any of the news articles that are the subject of the instant lawsuit; the references quoted were added by WND after WND purchased the use of the already-completed news articles from Mr. Hays/Mr. Thompson.

57. other than what Mr. Hays/Mr. Thompson reported, WND had no knowledge of any kind that any of the sources with whom WND is reported to having interacted even existed.

58. WND has never had any interaction with the Tennessee Bureau of Investigation, either directly or through any other person acting for or on behalf of WND.

59. All of the information appearing in the news article posted in Oregon by WND on September 20,2000 was stated by Mr. Hays/Mr. Thompson to have been gathered by Mr. Hays/Mr. Thompson. as part of an investigation done by Mr. Hays/Mr.Thompson over a period of months preceding WND having any knowledge of the existence of Mr. Hays and having any contact of any kind with Mr. Thompson and having no knowledge at all that the investigation was being or had been conducted.

60. Neither in 2000 nor before 2000 did any WND employee or agent of any kind travel from Oregon or any other place to Tennessee in connection with or related in any way to or concerning any news articles that are the subject of the instant lawsuit.

61. No WND employee or agent of any kind ever initiated telephone or e-mail contact from Oregon or any other place into Tennessee, for the purpose of gathering information for or in connection with preparation or verification of the content of the news articles that are the subject of the instant lawsuit.

62. Every substantive detail included in the news articles that are the subject of the instant

lawsuit was provided to WND by Mr. Hays after which there were a few unrecorded telephone conversations with Mr. Hays/Mr. Thompson about the articles, and/or the investigation by which the information in the news articles was collected.

63. When WND received telephone calls from Mr. Hays/Mr. Thompson, WND had no knowledge by which to verify where Mr. Hays/Mr. Thompson was/were when the calls were placed.

64. From these conversations, all of which occurred prior to WND posting the subject news articles in Oregon on the WND's Oregon website, WND was assured that the information provided to WND was accurately reported and based on reliable sources.

65. Once WND acquired ownership of the news articles that are subject of the instant lawsuit, WND edited the news articles, with edits, none of which changed any substance of the news reported as provided by Mr. Hays/Mr. Thompson, before posting the news article on September 20. 2000 in Oregon.

66. While it is impossible for WND. at any time from and before filing of the complaint in the instant case in September 2001, to know

precisely what edits WND made of the news articles, the inclusion of the references to WND in the excerpts quoted, in enumerated paragraph 55 above, is typical of edits made by WND in illustrating that WND made no edits that changed any substance of the content.

67. Neither in 2000 nor before or after 2000 did WND agree, with any person (human beings and entities alike) to accomplish any goal by any means where dissemination of information about Clark Jones was either part of the agreement as a means to an end or as part of the end.

68. The only agreement, involving any of the news articles that are the subject of the instant lawsuit, by WND was that WND would pay to Mr. Hays/Mr. Thompson, as more particularly specified in enumerated paragraph 67 above, relatively negligible amounts of money in return for Mr. Hays/Mr. Thompson selling to WND the rights and entitlements to the news articles for the use and benefit, as newsworthy information, of WND.

69. WND, in accordance with its agreement more particularly specified in the immediately preceding enumerated paragraph, paid Mr.

Hays/Mr. Thompson the agreed amount of money for WND's use of the subject news articles and, thereby, fulfilled one hundred percent of the obligation WND undertook by the agreement and never, theretofore or thereafter, has had any obligations, formal or informal, tacit or verbal or any other kind, to anybody, with respect to what use or disposition WND might make of the news articles.

70. Neither in 2000 nor before or after 2000 did WND make any agreement, be it formal or informal, tacit or verbal, enforceable or unenforceable, to post any of the news articles, on the WND Oregon website or in any other way to transfer the information imparted by the news articles, in whole or in part, to any person (human and entity alike).

71. The purchasing of the use of the news articles from Mr. Hays/Mr. Thompson, as with purchasing the use of other news articles from other freelance reporters, was not based on an agreement by WND to post the news articles for use on the WND website; to the contrary, WND always reserves exclusively unto itself what WND posts on the WND website and when, if ever, to post what WND chooses to

post.

72. With respect to the 2000 presidential election, WND expressed no corporate editorial opinion as to whether voters should cast their vote for any candidate in opposition to any other candidate; particularly, WND expressed no corporate editorial opinion and had no corporate position with respect to whether Albert Gore, Jr. or George W. Bush was the more suitable candidate to hold the office of President.

73. With respect to the 2000 presidential election, the news articles that are the subject of the instant lawsuit were not posted by WND with the intent to be of more value to voters of one state over the voters in anyone of the other forty-nine states.

74. With respect to the 2000 presidential election, the news articles that are the subject of the instant lawsuit were posted by WND with the intent to help inform readers throughout the United States about information gathered by Mr. Hays/Mr. Thompson about Al Gore.

75. WND was motivated in WND's decision, exclusively made by WND without concert with any other person (human or entity), to post, in Oregon, the subject news articles on

the WND website by nothing other or more than the business judgment of WND that the information imparted by the news articles was newsworthy, timely and based on investigative journalism conducted by persons with longstanding and well-tested reputations for reliable investigative reporting widely-published by print and telecast media and the assurances of the Mr. Hays/Mr. Thompson that the information was documented and/or documentable by reliable sources.

STATE OF VIRGINIA
COUNTY OF FAIRFAX

Personally appeared before me, Joseph Farah, with whom I am personally acquainted, and who, in his capacity of President of WorldNetDaily.com Inc., acknowledged that he executed the within instrument for the purposes therein contained, and who further acknowledged that he is the President of WorldNetDaily.com, Inc., a Delaware corporation, and is authorized by that entity to execute this instrument on behalf of WorldNetDaily.com Inc., a Delaware

corporation.

/s/ Joseph Farah
Joseph Farah

Witness my hand, at office, this 20th day of July, 2004.

/s/ Julie K. Konnor
Notary Public

My Commission Expires:
Julie K. Konnor, Notary Public
Commonwealth of Virginia
My Commission Expires 05/31/2008

CERTIFICATE OF SERVICE

This is to certify that the foregoing AFFIDAVIT OF WORLDNETDAILY.COM was served upon counsel for the adverse party by placing a true and exact copy in the United States mail, postage prepaid, addressed to:

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on this the '28th day of July 2004.

/s/ Larry E. Parrish
Larry E. Parrish

IN THE CIRCUIT COURT OF HARDIN COUNTY,
TENNESSEE AT SAVANNAH

CLARK JONES

PLAINTIFF,

VS. NO. 3414

TONY HAYS,
CHARLES C. THOMPSON, II
CENTER FOR PUBLIC INTEGRITY;
a corporation, RON SHANK and/or
JOHN DOE D and JANE DOE D,
SAVANNAH JOURNAL, LARRY BRINTON
LANDMARK TELEVISION OF
TENNESSEE/NEWS CHANNEL 5
NETWORK d/b/a WTVG/CHANNEL 5
(NASHVILLE), CHARLOTTE ALEXANDER,
DECATUR COUNTY CHRONICLE, LLC,
REBECCA HAGELIN,
WORLD NET DAILY.COM, INC.,
WORM CORPORATION d/b/a CHANNEL 6,
WSIB and WSIB 93.9 FM,
SAVANNAH SNITCH,
JOHN DOE and/or JANE DOE E d/b/a
TENNESSEE RIVER PRESS)
H. J. MAXEDON,
JOHN DOES A, S, AND C,
JANE DOES A, B. AND C,

DEFENDANTS.

WORLDNETDAILY.COM'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION *IN LIMINE* TO STRIKE DEFENSES

As its response to "Plaintiffs Motion *In Limine* To Strike Defenses To Defamation Asserted By Defendants Relying On Unnamed And Undisclosed Sources Or, In The Alternative, To Compel Defendants Tony Hays, Charles C. Thompson, II And Center For Public Integrity To Disclose Sources' (hereinafter "Motion *in limine*'), defendant, WorldNetDaily.Com (hereinafter "**WND**'), adopts in full, and incorporates herein as if its own, the "Response in Opposition to Plaintiffs Motion *In Limine* To Strike Defenses" submitted by Center for Public Integrity (hereinafter "**C PI**") on or about June 11, 2004 (a copy of same attached hereto as **Exhibit A**).

Unlike CPI or defendants, Tony Hayes and Charles Thompson. WND did no investigation or independent reporting of news at issue in this cause of action. The unnamed Sources who are at issue in Plaintiffs *Motion In Limine* are unnamed Sources of either CPI, Tony Hayes, Charles Thompson, or a combination of two or more of the three. WND has identified some _____ references to "unnamed sources" that are identified in the September 20, 2000 article at issue herein. WND does not know the identity of those unnamed sources, and thereby has no way of

providing their identification to Plaintiff even if the shield law and constitutional privilege were not in effect. WND has no independent recollection as to whether, at any time, prior to the posting of the September 20, 2000 article on WND's website, that either CPI, Tony Hayes or Charles Thompson revealed the name of any of those unnamed sources to WND during the few conversations WND had with the free-lance reporters prior to publication. WND does know that it has no written notes or memoranda, or any sort of memorialization of those conversations, which includes the names of those people identified as "unnamed sources."

Although WND does not consider itself to have sources in light of its purchasing of the articles from the free-lance journalist, WND understands the wall to provide WND with the affirmative defense of truth in spite of its separation from the actual investigative reporting and gathering of sources and source material. WND believed at the time, and continues to believe, that the substance of the articles at issue, particularly the September 20, 2000 article, is true, and that determination of WND depended on and was based on, exclusively, the journalistic reputations and backgrounds of Koute Royce/CPI, Charles Thompson, and Tony Hayes, with a particular focus on CPI and Charles Thompson, and on the work itself as presented to WND by Tony Hayes and Charles Thompson, which included numerous and myriad sources, most of whom were named, and most of whom were quoted directly, along with WND's

interaction with Tony Hayes and Charles Thompson prepublication (which interaction was well within the range of that which is standard and customary in the industry by which a news service assures itself to a reasonable degree of professional discernment that the articles to be published have news value to the publisher's readership and are well-sourced and well-presented, in which interaction includes, with respect to unnamed sources, a reasonable degree of scrutiny as to the reporters' demonstration of the credibility and veracity of those unnamed sources, the possibility or likelihood of converting the unnamed sources to named sources, and the editorial assessment, based heavily on the reputations and prior work of the free-lance journalists, involved in balancing the various concern/interest in proceeding with reporting based on unnamed sources versus excising those particular portions of the articles relying on those sources and/or opting not to run the articles in question at all).

In all other respects, as expressed above, WND adopts all arguments set out in CPI's Response In Opposition To Plaintiffs Motion *In Limine* To Strike Defenses, attached hereto as Exhibit A.

Respectfully Submitted,

/s/ Larry E. Parrish P.C.
LARRY E. PARRISH. P.C .

IN THE CIRCUIT COURT OF HARDIN COUNTY,
TENNESSEE AT SAVANNAH

CLARK JONES,
Plaintiff,

vs. No. 3414

TONY HAYS, et at, Judge McPherson
Defendants.

RESPONSE IN OPPOSITION TO PLAINTIFFS MOTION *IN LIMINE* TO STRIKE DEFENSES

Defendant Center for Public Integrity ("CPI") respectfully submits this opposition to the motion filed by Plaintiff styled "Plaintiffs Motion *In Limine* to Strike Defenses to Defamation Asserted by Defendants Relying on Unnamed and Undisclosed Sources or, in the Alternative, to Compel Defendants Tony Hays, Charles C. Thompson, II and Center for Public Integrity to Disclose Sources" (the "Motion *in Limine*"). Plaintiff seeks dispositive relief - the striking of the *entire* truth defense - without regard to what portions of the September 20, 2000, news article posted on WorldNetDaily ("WND") were based partially or exclusively on confidential sources, and without regard to whether he has demonstrated actual malice by each and every defendant. Plaintiffs requested relief is not available through a motion *in limine*. More important, Plaintiffs motion, which only cites

the Tennessee statutory newsperson's privilege (the "Shield Law"), completely overlooks the First Amendment and state constitutional protections of confidential sources. Plaintiffs recently disclosed action of making his own Freedom of Information Act (FOIA) request to the Drug Enforcement Agency demonstrates that he has admitted that he has not met at least one requirement for divestiture of the constitutional newsperson's privilege, i.e., that he must exhaust all reasonable alternative sources of information.

FACTUAL BACKGROUND

CPI is a public-service news organization, dedicated to inspiring a better- informed citizenry to demand a higher level of accountability from its government, political and elected leaders. (*See* Answer to Amended Complaint' 22.) As has been noted, CPI did not publish the news article challenged by Plaintiff Clark Jones.

As disclosed in the challenged news article, freelance journalists Hays and Thompson relied upon confidential sources in preparing their news stories. Reliance upon confidential sources is often necessary in order to gather news from well-placed sources because "confidentiality is often essential to establishing a relationship with the informant." *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981). In Hays' deposition (on file), the reporter's privilege was asserted as to

the disclosure of names of confidential sources. Based upon a review of Hays' deposition, it appears that only one statement challenged by Plaintiff (*e.g.*, that a confidential source states that Jones's name appears in federal law enforcement records as an alleged drug dealer) was sourced in the news article only upon a confidential source .. Hays declined to identify the federal employee who supplied him. with this information, relying upon the newsperson's privilege.

CPI sought to confirm the information supplied by the confidential source through an alternative means, in such a way that would avoid repercussions to the confidential source and respect the newsperson's privilege. On September 8, 2003, pursuant to the Freedom of Information Act ("FOIA"), 5 D.S.C. § 552, CPI formally requested of the DEA (among other agencies) all information regarding, relating or pertaining to the plaintiff, including any reference to the plaintiff in the records of the National Crime Information Center or the El Paso Intelligence Center. (*See* Ex. B to CPI's Motion to Deem Admitted,) The DEA refused to provide any information, citing the fact that CPI did not have an authorization from the Plaintiff. (*See* Ex. C to CPI's Motion to Deem Admitted.) CPI asked Plaintiff to consent to its FOIA requests, but the Plaintiff refused, and has continued to refuse in filings and arguments. (*See* Ex. D to CPI's Motion to Deem Admitted.)

Defendants have just recently learned, from another recent discovery request received from Plaintiff, that the Plaintiff on May 10, 2004, made his own FOIA request to the DEA. (*See* Ex. A attached hereto.) On May 20, the DEA appears to have stated that it would carry out the Plaintiffs request and, *the next day*, the DEA appears to have stated that it had searched its records and "located no records which are responsive to [the FOIA] request." (*See* Ex. B attached hereto.)

ARGUMENT

Plaintiffs Motion *In Limine* attempts to extinguish not only the Defendants' truth defense, but also their First Amendment and state constitutional rights without even recognizing that those rights exist. Plaintiffs argument basically is that one clause of the Tennessee Shield Law, T.C.A. § 24-1-208(b), permits him either to obtain[1] the identity of the confidential source or to prohibit the Defendants from referring to that source in any

---

[1] Defendant CPI's Motion to Deem Admitted the Request for Admission that Plaintiffs Name Is Mentioned in Federal Law Enforcement Records or, in the Alternative, Motion *In Limine*. filed April 28. 2004.

respect-effectively arguing for a "carve out" to the Defendants' First Amendment and state constitutional right against revealing confidential sources. Of course. the protections afforded by the United States and Tennessee Constitutions are in addition to those provided by state statute. Plaintiff must, therefore, do more than state conclusorily that the "carve out" in the Tennessee Shield Law applies - he must also demonstrate by clear and compelling evidence the existence of a compelling need to overcome the Defendants' constitutionally-based newsperson's privilege. Plaintiff does not even attempt to do so.

I. PLAINTIFFS CONFLICTS OF LAW ARGUMENT SHOULD BE DISREGARDED.

Most of Plaintiffs brief is an argument about what state's laws should be applied to the issue of the newsperson's privilege. Plaintiffs conflicts argument should be disregarded for two reasons: first, it is unnecessary at this stage; and second, it is incorrect.

The Plaintiffs conflict of law analysis is unnecessary because there is no conflict to address at this time. The first step of such an analysis is to determine whether the competing laws actually conflict. *See Hataway v. McKinley.* 830 S.W.2d 53, 55 (Tenn. 1992); *see also Seals v. Delta Air Lines, Inc.*, 924 F. Supp. 854, 859 (E.D. Tenn. 1996) ("A

preliminary issue in deciding which state's law applies is whether an actual conflict of law exists."). Here, as Plaintiff essentially concedes. CPI could not be compelled to disclose any confidential sources under the District of Columbia Shield Law, and as explained below, such disclosure is also inappropriate in Tennessee.[2]

In any event, the conflict of law analysis made by the Plaintiff is not the correct one. While there might be presented at some stage a potential conflict of ***privilege*** law, Plaintiff provides an analysis of conflict of ***tort*** law-which is completely different. Compare Restatement (2d) Conflicts of Law, § 139 (conflict of privilege law-focus on the ***communication*** at issue) *with id.*, § 146 (conflict of tort law-focus on the alleged injury). It certainly is possible for one jurisdiction's libel law and another jurisdiction's privilege

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[2] Plaintiff also fails to acknowledge that Tennessee and the District of Columbia (whose newsperson's privilege is codified at D.C. Code § 16-4701 to -4704) are not the only jurisdictions with an interest in the communications at issue. Virginia (whose newsperson's privilege was recognized in *Brown v. Commonwealth*, 204 S.E.2d 429, 431 Na. 1974", where Defendant Thompson resided and worked during the relevant period, may have an interest in the communication, as might the state (or states) in which the confidential source resides and works. Defendant CPI notes this issue and preserves it.

law to apply to the same statement.

II. PLAINTIFF'S MOTION *IN LIMINE* IS OVERREACHING AND SHOULD, ON THAT BASIS, BE DENIED.

In describing the motion before this Court as a "motion *in limine*," Plaintiff mischaracterizes his own motion. A motion *in limine* is a pretrial request to exclude certain evidence at trial, *see Black's Law Dictionary* at 1033 (7th ed. 1999), but Plaintiff is requesting much more of this Court than the mere exclusion of evidence. Instead, Plaintiff overreaches and "requests this Honorable Court to ***strike any defense*** asserted by Defendants which relies on unnamed or undisclosed 'confidential sources'... " (Motion *in Limine* at 3 (emphasis added).) In essence, Plaintiff is asking the Court to sanction the Defendants with the loss of one or more entire defenses. without regard to the merit of those defenses (even without the confidential sources). or any analysis of whether any of the particular statements in the challenged article are libelous or meet the constitutional actual malice standard (which applies in this case based upon the Court's ruling that Plaintiff is a public figure). The reporter's privilege is based in the federal and Tennessee Constitutions, statutes and common law.

Under the circumstances, Plaintiffs requested relief is unavailable. If Plaintiff wishes to strike one or more defenses asserted by any Defendant, he must bring a motion for partial summary judgment and have those defenses adjudicated on the merits. *See BellSouth Advertising & Publ'g Co. v. Johnson,* 100 S.W.3d 202, 205 (Tenn. 2003) ("Summary judgment is appropriate where there is no genuine issue of material fact relevant to the claim or *defense* ... " (emphasis added).); *see* also Tenn. R. Civ. P. 12.06 (forbidding motions to strike a defendant's answer after 30 days from service of that pleading). Plaintiffs Motion *In Limine* cannot even remotely be construed as a motion for partial summary judgment, since it fails to meet any of Rule 56's requirements.

Therefore, Plaintiffs Motion *In Limine* should be denied because it seeks relief to which it is not entitled under the Tennessee Rules of Civil Procedure.

III. PLAINTIFF CANNOT OVERCOME THE CONSTITUTIONAL PRIVILEGE BECAUSE HE HAS ACKNOWLEDGED THE EXISTENCE OF AN ALTERNATE MEANS OF OBTAINING THE INFORMATION.

Focusing exclusively on one clause of the Tennessee Shield Law, Plaintiff fails to address the ***Constitutional*** newsperson's privilege, based on the First Amendment and

Tennessee constitutional guarantees of freedom of the press. This privilege is *in addition* to that provided by the Tennessee Shield Law. Even if the Plaintiffs argument about the "carve-out" provision of T.C.A. § 24-1-208(b) might be well taken (which is strongly disputed), it has absolutely *no effect* upon the Constitutional reporter's privilege.

The roots of the First Amendment newsperson's privilege against disclosure of confidential information, including confidential sources, may be found *in Branzburg v. Hayes*, in which the United States Supreme Court stated:

> We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press would be eviscerated.

408 U.S. 665, 681-82 (1972). Recognizing that reporters have "constitutional rights with respect to the gathering of news or in safeguarding their sources," Justice Powell admonished courts to protect those rights by balancing them against society's interest in fair and effective adjudication "on a case-by-case basis," the "tried and traditional way of adjudicating such questions." *Id.* at 709-10 (powell, J., concurring). "In short, the courts will be available to newsmen

under circumstances where legitimate First Amendment interests require protection." *Id.* at 710.

Following *Branzburg*, the Constitutional newsperson's privilege has become widely accepted across the country. *See Southwell v. Poverty L. Center*, 949 F. Supp. 1303, 1311-12 & n.22 (W.D. Mich. 1996) (noting that nine of the twelve circuits recognize the First Amendment privilege); *Mitchell v. Superior Court*, 690 P.2d 625, 629 (Cal. 1984) (noting the national breadth of acceptance of the newsperson's privilege).[3]

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[3] See, e.g., *Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981) ("[A] qualified reporter's privilege under the First Amendment should be readily available in civil cases."); *Bruno & Stillman, Inc. v. Globe Newspaper Corp.*, 633 F.2d 583,595-96 (1st Cir. 1980) (reversing order compelling discovery in a defamation action based on reporter's privilege); *United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983) ("This Circuit has recognized ... that the reporter's qualified privilege extends to ... civil ... cases."); *Riley v. City of Chester*, 612 F.2d 708, 715 (3d Cir. 1979) (reversing civil contempt judgment in § 1983 action based on reporter's privilege); *LaRouche v. National Broadcasting Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986), (affirming order denying motion to compel in defamation action based on reporter's privilege); *Miller v. Transamerican* Press, Inc., 621 F.2d 721 (5th Cir. 1980) (recognizing reporter's privilege in defamation action but finding privilege overcome); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 918 (8th Cir. 1997) (describing *Cervantes v. Time, Inc.*, 464 F.2d 986, 992-93, n.9 (8th Cir.

It is well recognized that the Constitutional newsperson's privilege applies to the protection of confidential sources. *See, e.g., Zerilli v. Smith*, 656 F.2d 705, 710- 11 (D.C. Cir. 1981). This is because the protection of such sources promotes the free flow of information:

> The First Amendment guarantees a free press primarily because of the important role is can playas a vital source of public information ... Without an unfettered press, citizens would be far less able to make informed political, social and economic choices. But the press' function as a vital source of information is weakened whenever the ability of journalists to gather new is impaired. Compelling a reporter to disclose the identity of a source may significantly interfere with this news gathering ability; journalists frequently depend on informants to gather news, and confidentiality is often essential to establishing a relationship

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1972) as "recognizing that reporter's privilege may apply n' in ... civil cases"); *Shoen v. Shoen*, 5 F.3d 1289, 1296 (9th Cir. 1993); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 43637 (10th Cir. 1977) (reversing order compelling discovery in civil action based on reporter's privilege); *Bonner v. City of Prichard,* 661 F.2d 1206, 1207 (11th Cir. 1981) (inheriting the Fifth Circuit's decisional law); *Winegard v. Oxberger*, 258 N.W.2d 847, 850 (Iowa 1977); *Hopewell v. Midcontinent Broad. Corp.*, 538 N.W.2d 780, 782 (S.D. 1995); *Senear v. Daily Journal-American*, 641 P.2d 1180, 1183 (Wash 1982).

with the informant.

Id. at 711.

As with other privileges, once the newsperson's privilege has been invoked, the burden shifts to the challenging party to demonstrate a sufficiently compelling need for the information in order to overcome the privilege. *See Shoen v. Shoen*, 5 F.3d 1289, 1296 (9th Cir. 1993). Because of "the preferred position of the First Amendment and the importance of a vigorous press," this burden is heavy, such that "in the ordinary case the civil litigant's interest in disclosure should yield to the journalist's privilege. Indeed, if the privilege does not prevail in all but the most exceptional cases, its value will be substantially diminished." *Zerilli*, 656 F.2d at 712. Thus, to overcome the newsperson's privilege, the challenging party must, "at a minimum" show (1) that "the information sought is not obtainable from another source," and (2) that "the information sought goes to the heart of the matter, that ... it is crucial to [the challenging party's] case." *Zerilli*, 656 F.2d at 713. Many courts add a third requirement, that there be a compelling public interest in the information sought. *See, e.g., LaRouche v. Nat'l Broad. Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980); compare T.C.A. § 24-1208 ©) (2) (allowing divestiture of the Tennessee Shield law only if the equivalent of all three of these requirements

are met).

No matter how important the challenging party claims the information sought is to his case, it is well settled the challenging party may satisfy the first prong-that "the information sought ... not [be] obtainable from another source"***-only if*** he shows that "he has exhausted ***every reasonable alternative source of information.***" *Zerilli*, 656 F.2d at 713 (emphasis added); *Shoen,* F.3d at 1296 ("[Before disclosure may be ordered, the requesting party must demonstrate that she has exhausted all reasonable alternative means for obtaining the information.").

In this case, not only has Plaintiff failed to show in his Brief that he has even attempted to pursue alternative means for obtaining the information in question, but by his recent disclosure that he made his own FOIA request to the DEA less than a month ago,[4] he has admitted that he considers that at least one such alternative means exists and further that he

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[4] The fact that while publicly opposing the existence of information from the TBI, FBI and DEA the Plaintiff's simultaneously seeking the same information himself from these agencies raises the inquiry by what other way is he seeking information, and if such information is revealed by these agencies, whether and when Plaintiff will produce the information.

contends that the DEA's response establishes the falsity of one element of the news story posted by WND. Although Plaintiff for months refused CPI's efforts to obtain information from the DEA (while arguing to the Court that he should not have to and also that the Defendants were not entitled to a discovery extension), Plaintiff himself made a FOIA request to the DEA on May 10, 2004. The Defendants now have been asked by the Plaintiff to admit that the DEA has no record, anywhere in the country, mentioning the Plaintiff. Defendants will, in connection with Plaintiff's discovery request, determine what sort of search the DEA's FOIA officer conducted in making a one-day turnaround of the Plaintiffs FOIA request, and whether the FOIA response supports Plaintiffs position. In any event. Plaintiff's discovery demonstrates that he believes the DEA is a "reasonable alternative source of information" to the information provided by the confidential source to Tony Hays reported in the challenged news article.

Accordingly, Plaintiffs Motion *in Limine* should be denied.[5]

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[5] Plaintiff also failed to explain how the information sought from the confidential source "goes the heart" of his case, and on that basis also, his Motion *In Limine* should be denied.

IV. DISCLOSURE OF THE CONFIDENTIAL SOURCE'S IDENTITY WOULD BE UNDULY BURDENSOME UNDER THE RULES OF CIVIL PROCEDURE AND THE CONSTITUTIONAL FREEDOM OF THE PRESS.

Under the Tennessee Rules of Civil Procedure, the Court may limit Plaintiffs attempts to discover the identity of a confidential source "if it determines that ... the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." Tenn. R. Civ. P. 26.02(1){iii). In applying discovery rules, "when a discovery demand arguably impinges on First Amendment rights" a court "should measure the degree of relevance required in light of both the private needs of the parties and the public concerns implicated ... [T]he solicitude for First Amendment rights evidenced in our opinions ,reflects concern for the important public interest in a free flow of news and commentary." *Herbert v. Lando*, 441 U.S. 153, 179~80 (1979) (Powell, J., concurring).

In applying its equivalent of Rule 26.02(1) to a defamation plaintiffs request for the disclosure of confidential sources, our sister jurisdiction of Georgia has recently fashioned a test similar to the *Zerilli* test: "[I]f [plaintiff] cannot succeed on a specific allegation of libel as a matter of

law, or if [plaintiff] is able to prove his specific allegation through the use of available alternative means, then the trial court's balancing test should favor nondisclosure of the confidential sources." *Atlanta Journal-Constitution v. Jewell*, 555 S.E.2d 175, 181 (Ga. Ct. App. 2001). As that court explained, "Even where a privilege is unavailable, there is a strong public policy favoring the protection of the confidentiality of journalists' sources consistent with that favoring the protection of other types of sensitive information during discovery. Thus- the trial court was obligated under O.C.G.A. § 9-11-26 [the equivalent of Tenn. R. Civ. P. 26.02(1)] to balance [plaintiffs] need for the identities of the confidential informants against [defendant~s] interest in protecting the privacy of the confidential information and the freedom of the press in general." *Id.*. at 180.

Here, as discussed above, Plaintiff has admitted that alternative means are available to him through his FOIA request to the DEA. In addition, at least until the DEA's sources of information are thoroughly investigated, there can be no determination of whether Plaintiff can or cannot "succeed on a specific allegation of libel as a matter of law." *Id.* at 181. Furthermore, as courts around the country have found, revealing a confidential source's identity is burdensome on the press because it compromises the press' ability to gather news and to serve the public. *See, e.g., Zerilli*, 656 F.2d at 711. Requiring a reporter to disclose a

confidential source forces the freelance reporters into a Hobson's choice of diminishing their ability to carry out reporting or forsaking a viable and important defense.

Therefore~ because the public's interest in privacy and a free and robust press, in combination with the substantial burden on CPI and other defendants, favors maintaining the confidentiality of the confidential source, Plaintiffs Motion also should be denied under Tennessee Rule of Civil Procedure 26.02(1).

CONCLUSION

For the foregoing reasons, Plaintiffs Motion in Limine should be denied.

Respectfully submitted,

/s/Robb. Harvey
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed first class, postage prepaid (unless otherwise noted below) to the following on the 10th day of June, 2004:

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IN THE CIRCUIT COURT OF HARDIN COUNTY, TENNESSEE AT SAVANNAH

CLARK JONES,

Plaintiff,

vs. **No.3414**

TONY HAYS, et al.

Defendants.

ORDER ON MOTION OF DEFENDANTS FOR PARTIAL SUMMARY JUDGMENT

This matter came on to be heard before the Court on motions of the Defendants for the Court to find that the Plaintiff in this case, Clark Jones, was either a "public official" or a "public figure" and therefore a standard be imposed that the Plaintiff must establish "actual malice" under the law of libel to recover against these Defendants.

It is the contention of the Defendant that based upon the following undisputed facts the Court should find as a matter of law that the Plaintiff was a "public official" or in the alternative, if not a "public official", a "public figure".

1. Plaintiff was Treasurer of the Tennessee Democratic Party from 1997 to 1999.
2. Plaintiff was the Treasurer of the group "Tennessee Democratic Victory 2000."
3. Plaintiff was a major fund raiser for Presidential Candidate Albert Gore which was reported by national wire services.
4. Plaintiff granted interviews to numerous news reporters regarding his fund raising efforts on behalf of Presidential Candidate Albert Gore.
5. The Gore Presidential Campaign released reports that Plaintiff was one of thirty persons who raised in excess of$100,000 for the Gore campaign.
6. Plaintiff was Chairman of the Tennessee Motor Vehicle Commission from 1990 to 1994.
7. Plaintiff was the Chairman of the Governor's Council on Job Training from 1986 to 2000.
8. Plaintiff was appointed by President Clinton to the Eleven Person White House Conference on Small Business.
9. Plaintiff attended the National Economic Summit in December of 1992.
10. Plaintiff was Chairman of the Hardin County Democratic Party from 1986 to 1988.

11. Plaintiff was a past President of the Savannah Chamber of Commerce and the Savannah Rotary Club.

12. Plaintiff has been a speaker in several cities as a participant in the White House Commission on Small Business.

Prior to 1964 laws of the various states had consisted of common law principles and libelous statements were not considered to be deserving of First Amendment Protections.

In New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, the United States Supreme Court held that the First Amendment protected good-faith critics of the official conduct of public officials from defamation suits.

The Court stated:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' - that it is, with knowledge that it was false or with reckless disregard of whether it was false or not."

Id. At 279,84 S.Ct. at 726.

IN THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

In re: GRAND JURY SUBPOENAS TO MARK FAINARU-WADA, LANCE WILLIAMS, and THE SAN FRANCISCO CHRONICLE,

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MARK FAINARU-WADA; et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF AND APPENDIX FOR AMICI CURIAE STATES OF NEW YORK, ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, FLORIDA, HAWAII, ILLINOIS, IOWA, KENTUCKY, MARYLAND, MASSACHUSETTS, MISSISSIPPI, MONTANA, NEVADA, NEW MEXICO, NORTH CAROLINA, OKLAHOMA, OREGON, TENNESSEE, TEXAS, UTAH,

WASHINGTON, WEST VIRGINIA· AND THE COMMONWEALTH OF PUERTO·RICO IN SUPPORT OF REVERSAL OF THE DISTRICT COURT

ELIOT SPITZER
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Dated: December 7, 2006

CAITLIN J. HALLIGAN
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IDENTITY AND INTEREST OF THE AMICI CURIAE

Twenty-four states and the Commonwealth of Puerto Rico file this amici brief under Federal Rule of Appellate Procedure 29(a) in support of reversal of the district court's order. Unlike the district court, almost all of these states would provide reporters with at least some protection against revealing the identities of confidential sources before a grand jury. This protection embodies the amici states' recognition that the free flow of information is vital to the workings of a healthy democracy; that journalists play a crucial role in gathering and reporting such information; that the most important information must often come from sources who

need or prefer to remain confidential; and that without the confidentiality guaranteed by the reporter's privilege, the sources will remain silent and their information secret. The district court's decision undermines the states' protection by refusing to recognize any federal common-law privilege, let alone a privilege that would consider the public's interests before requiring disclosure of confidential sources. As a result, the amici states urge the court to adopt a qualified federal common-law privilege that considers the interests of the public, as well as the interests of the litigants, before requiring reporters to disclose the identities of their confidential sources. Amici take no position on the application of this privilege to the facts of the case.

SUMMARY OF ARGUMENT

In determining whether to recognize a federal common-law evidentiary privilege, federal courts consider -the policies of the states with respect to the asserted privilege. Here, the states' broad protection for reporters weighs in favor of recognizing a common-law reporter's privilege. Moreover, that privilege should require that any effort to overcome it include a showing that the public interest in disclosure outweighs the public -interest in confidentiality. A lesser federal privilege, or no privilege at all, renders meaningless the states' protections and chills speech as much as a complete absence of state protection would.

ARGUMENT

THE COURT SHOULD RECOGNIZE A QUALIFIED COMMON-LAW PRIVILEGE THAT WEIGHS THE INTEREST OF THE PUBLIC AND THE LITIGANTS BEFORE REQUIRING REPORTERS TO DISCLOSE THE IDENTITIES OF THEIR CONFIDENTIAL SOURCES

Federal Rule of Evidence 501 provides that "the privilege of a witness ... shall be governed by the principles of the common law as they may be interpreted by the courts of the united States in the light of reason and experience." In Jaffee v. Redmond, 518 U.S. 1 (19.96), the Supreme Court applied Rule 501 to recognize a new evidentiary privilege protecting communications between psychotherapists and patients. In doing so, it relied heavily on "the policy decisions of the States," for two reasons.

Id. at 12-13. First, it recognized that "a consensus among the States indicates that 'reason and experience' support recognition of the privilege." Id. at 13. Second, it understood that "any state's promise of confidentiality would have little value if. the [communicant] were aware that the privilege would not be honored in a federal court." Id. Both of these factors apply as strongly here as they did in Jaffee, and

therefore support recognition of a federal common-law reporter's privilege.[1]

The states' extensive protection of reporters indicates that a privilege should be recognized that also protects reporters in federal court. As described in the Appendix, thirty-nine states protect journalists who are asked to name confidential sources before a grand jury, nineteen of them via an absolute privilege or immunity from contempt, and twenty others with a qualified privilege subject to a balancing test.[2] Fully thirty-four of these states (including California, where the articles under investigation were published, and all of the other states in this circuit but the one that has not spoken on the issue) would unquestionably provide some protection to the reporters in this case, were the reporters before a grand jury in those states. Moreover, unless the reporters are

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[1] The Court also considered two other factors, the importance of the public and private interests involved, and the likely evidentiary benefit that would result from denying the privilege. 518 U.S. at 11-12. since these factors are fully briefed elsewhere, amici simply note their position that these factors also support recognition of a reporter's privilege .

[2] As described in Appellants' Opening Brief (pp, 35-36 & nn. 10-11), every state except Wyoming would protect journalists in some circumstances.

considered to be eyewitnesses to a crime, another four states would protect them.[3]

Thus, there is "a consensus among the State." Jaffee, 518 U.S. at 13. This consensus demonstrates that "reason and experience' support recognition of the privilege." Id. Just as importantly, however, the consensus demonstrates the extent of the harm of not recognizing a federal privilege. As the Supreme court said in Jaffee, the lack of a federal privilege renders the states' protections of "little value" to one who wishes to communicate confidentially because the communication remains unprotected in federal court. Id. Denying a federal privilege thus "would frustrate the purposes of the state legislation" and the state court decisions that seek "to foster these confidential communications."

If this Court recognizes a reporter's privilege, it should require a finding that disclosure is in the public's interest before confidentiality is breached. While the states are not uniform in this regard,[4] the majority, thirty-two of them,

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[3]The remaining state, Rhode Island, would provide a privilege for anything but an investigation into a breach of grand jury secrecy.

[4] The federal courts have also expressed differences of opinion about the scope of a common-law reporter's privilege. Compare In Re Grand Jury Subpoena (Miller), 397 F.3d 964,

provide at least that much protection to reporters before a grand jury. For instance, eight states -- Alaska, Arkansas, Connecticut, Illinois, Louisiana, Minnesota, North Dakota, and Tennessee --_ require findings that disclosure is essential to the public interest (or that non-disclosure would be contrary to that interest). Five more Mexico, and Wisconsin Colorado, Hawaii, Massachusetts, New require the private interests in disclosure to be so important that they outweigh the public interest in confidentiality. And, of course, nineteen states provide an absolute privilege.

Reason and policy support explicit consideration of the public interest in any balancing test this Court adopts. Since the existence of the privilege derives from a recognition that it serves public interests, logically speaking it should be overcome only if public interests are no longer served by its

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998 (D.C. Cir. 2005) (Tatel, J., concurring) (arguing for a common-law reporter's privilege that weighs the public'S. interests), and The New York Times Co. v. Gonzales, 459 F.3d 160, 186 (2d Cir. 2006) (Sack, J., dissenting) (same), with In Re Grand Jury Supoena (Miller), 397 F.3d at 976 (Sentelle, J., concurring) (arguing that a common-law reporter'S privilege should be rejected) and The New York Times Co., 459 F.3d at 169-70 (declining to state the precise contours of a qualified common-law privilege because any such privilege would be overcome on the facts before the court).

application in a particular case. The alternative is "a test that, considers only the interests of the litigants, generally formulated as requiring the sought-after information to be material, relevant, otherwise unavailable, and necessary to the party seeing disclosure (see Appendix at A-4). But such a test is problematic when the privilege is asserted by reporters who are asked to name their confidential sources of leaked information, because the litigant seeking disclosure can almost always argue that it needs the information and cannot obtain it elsewhere. A privilege that does not include a consideration of the public's interests, in addition to the litigants' interests, thus would be ineffective. See The New York Times Co. v. Gonzales, 459 F.3d 160, 185-86 (2d Cir. 2006) (Sack, J., dissenting); In Re Grand Jury subpoena (Miller), 397 F.3d 964, 997-98 (D.C. Cir. 2005) (Tatel, J., concurring). And as with recognition of the privilege generally, recognition of a less-protective privilege would undermine the states' protections and chill the speech that the states seek to foster.

CONCLUSION

For the reasons set forth above, the Court should recognize a qualified common-law reporter's privilege that can only be overcome after a showing that the public interest would be served by disclosure of confidential sources to a grand jury.

Dated: Albany, New York
December 7, 2006

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Undisputable Facts By Jones

Hays and Thompson wrote 18 articles related to the 2000 Presidential race with a focus on trying to create a negative view of Mr. Gore, his family and supporters. (Plaintiff's Response To Defendant Center For Public Integrity's Statement Of Undisputed Facts In Support Of Motion For Partial Summary Judgment, filed 10/01/03, pg.2, response 1) (R. 9 p. 25)

There were eighteen consecutive articles written by Hays and Thompson obviously directed at the 2000 election for president. (Plaintiff's Response To Defendant Center For Public Integrity's Statement Of Undisputed Facts In Support Of Motion For Partial Summary Judgment, filed 10/01/03, pg.2, response 3) (R. 9 p. 25)

The eighteen articles on their face reflect the authors' efforts to influence the 2000 presidential election by denigrating the plaintiff and other Gore supporters. (Plaintiff's Response To Defendant Center For Public Integrity's Statement Of Undisputed Facts In Support Of Motion For Partial Summary Judgment, filed 10/01/03, pg.6, response 20) (R. 9 p. 25)

The plaintiff is the subject of only one of the articles, the one written by Hays and Thompson under date of

September 20, 2000. (Plaintiff's Response In Opposition To Defendant CPI's Motion For Partial Summary Judgment, filed 10/03/03, pg. 4) (R. 9 p. 25)

The table of contents of the Eighteen Articles, which reflect the contents of each article, shows that they all relate to Gore. (Plaintiff's Response In Opposition To Defendant CPI's Motion For Partial Summary Judgment, filed 10/03/03, pg. 4) (R. 9 p. 25)

These articles obviously relate to Gore and the Presidential election. (Plaintiff's Response In Opposition To Defendant CPI's Motion For Partial Summary Judgment, filed 10/03/03, pg. 6) (R. 9 p. 25)

The 'controversy' in which Clark Jones chose to take an active public role was the 2000 Presidential Campaign. (Memorandum In Support Of Plaintiff's Motion For Partial Summary Judgment And Motion To Alter Or Amend And For Specific Findings Of Fact And Conclusions Of Law, filed 06/23/04, p.20)

Appropriate for this Court to rule, as a matter of law, that the 'controversy' that made Clark Jones a limited public figure was the 2000 Presidential Campaign. (Memorandum In Support Of Plaintiff's Motion For Partial Summary Judgment And Motion To Alter Or Amend And

For Specific Findings Of Fact And Conclusions Of Law, filed 06/23/04, p.21)

Clark Jones made public statements to the press about fundraising for the Gore campaign. (Memorandum In Support Of Plaintiff's Motion For Partial Summary Judgment And Motion To Alter Or Amend And For Specific Findings Of Fact And Conclusions Of Law, filed 06/23/04, p.21)

The record shows that [Jones] granted television and radio interviews about fundraising for Mr. Gore's Campaign. (Memorandum In Support Of Plaintiff's Motion For Partial Summary Judgment And Motion To Alter Or Amend And For Specific Findings Of Fact And Conclusions Of Law, filed 06/23/04, p.22)

The record makes it clear that Clark Jones took an active role in the 2000 Presidential Campaign. (Memorandum In Support Of Plaintiff's Motion For Partial Summary Judgment And Motion To Alter Or Amend And For Specific Findings Of Fact And Conclusions Of Law, filed 06/23/04, p.22)

WND Supplemental Response To Jones' Interrogatory Number 34

David Kupelian, 2446 Elk Lane, Grants Pass, OR 97527. (541)597-1776. Mr. Kupelian's recollection is not specific as it relates to any particular edit, as distinguished from any other particular edit, or any particular oral interchange with Mr. Hays, as distinguished from any other particular oral interchange; from standard operating procedures combined with a few vague and non-specific recollections, WND (through no person other than Mr. Kupelian) knows that WND (through no person other than Mr. Kupelian) engaged in what is known as a 'copy edit' of each of the articles, before each was posted on the WND website; the purpose of the copy edit is to assure proper punctuation, grammar, spelling and clarity of expression; in the process of a copy edit, if an unidentified source is attributed with having supplied certain information that is deemed by WND to be important, it sometimes occurs (but is not guaranteed) that WND (through no person other than Mr. Kupelian) might make inquiry of Mr. Hays to satisfy WND that Mr. Hays' source is a person Mr. Hays has a sound reason to believe is reliable; WND (through no person other than Mr. Kupelian) has non-specific recollection of oral interchange with Mr. Hays in which Mr. Kupelian inquired about one or more of Mr. Hays' unidentified sources but cannot recall which source or what the attributed information was or what words

were exchanged between Mr. Kupelian and Mr. Hays; however, it can be stated by WND (through no person other than Mr. Kupelian) that whatever information Mr. Hays provided was sufficient to satisfy WND that the information Mr. Hays professed to have was enough for a reasonable person to believe that it was a reliable source; WND never had any reason to question that Mr. Hays was truthfully informing WND (through no person other than Mr. Kupelian) and, for that reason, never investigated the information by any means other than asking Mr. Hays and accepting as truthful what Mr. Hays informed Mr. Kupelian to be the facts of the matter; however, again, how many of these oral interchanges occurred and the specifics of the one or more such interchanges is not recalled.

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By : Charles C. Thompson and Tony Hays

§ 24-1-208. Privileges and immunities; news media exceptions

(a) A person engaged in gathering information for publication or broadcast connected with or employed by the news media or press, or who is independently engaged in gathering information for publication or broadcast, shall not be required by a court, a grand jury, the general assembly, or any administrative body, to disclose before the general assembly or any Tennessee court, grand jury, agency, department, or commission any information or the source of any information procured for publication or broadcast.

(b) Subsection (a) shall not apply with respect to the source of any allegedly defamatory information in any case where the defendant in a civil action for defamation asserts a defense based on the source of such information.

(c)(1) Any person seeking information or the source thereof protected under this section may apply for an order divesting such protection. Such application shall be made to the judge of the court having jurisdiction over the hearing, action or other proceeding in which the information sought is pending.

(2) The application shall be granted only if the court after hearing the parties determines that the person seeking the information has shown by clear and convincing evidence that;

(A) There is probable cause to believe that the person from whom the information is sought has information which is clearly relevant to a specific probable violation of law;

(B) The person has demonstrated that the information sought cannot reasonably be obtained by alternative means; and

(C) The person has demonstrated a compelling and overriding public interest of the people of the state of Tennessee in the information.

(3)(A) Any order of the trial court may be appealed to the court of appeals in the same manner as other civil cases. The court of appeals shall make an independent determination of the applicability of the standards in this subsection to the facts in the record and shall not accord a presumption of correctness to the trial court's findings.

(B) The execution of or any proceeding to enforce a judgment divesting the protection of this section shall be stayed pending appeal upon the timely filing of a notice of appeal in accordance with Rule 3 of the Tennessee Rules of Appellate Procedure, and the appeal shall be expedited upon the docket of the court of appeals upon the application of any party.

(C) Any order of the court of appeals may be appealed to the supreme court of Tennessee as provided by law.

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(2)

No. 06-1611

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JUN 25 2007
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SUPREME COURT, U.S.

In The

Supreme Court of the United States

TONY HAYS, CHARLES C. THOMPSON, II, WORLDNETDAILY.COM, and REBECCA HAGELIN,

Petitioners,

v.

CLARK JONES,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Tennessee

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether jurisdiction exists in this Court where: (1) no final decision has been made by the Supreme Court of Tennessee and the decision below involved the interpretation of a Tennessee statute and the limited right of appeal granted thereunder; and (2) the Petitioners waived their right to permissive interlocutory appeal in the state courts.

Whether certiorari is appropriate where the decision below does not conflict with any precedent of this Court, with any decision of the U.S. Courts of Appeals, nor with any decision of the highest court of any other state.

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Appendix A: *Tennessee Rules of Appellate Procedure*, Rule 9 ..... App. 1

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STATEMENT OF THE CASE AND PERTINENT FACTS

After demanding Petitioners to retract their defamatory statements pursuant to T.C.A. §29-24-103 (T/R Vol. 33, pp. 90-91), Respondent sued Petitioners in the Circuit Court of Hardin County, Tennessee for defamation, alleging that articles published and widely disseminated by Petitioners between September of 2000 and October of 2003 portraying him as a narcotics trafficker, "dope dealer," obstructor of justice, trader of TVA permits for political contributions and arsonist were false and malicious.[1] (T/R Vol. 2, pp. 2-14, 56-60, 144-145; T/R Vol. 3 pp. 108-111, 120-122; T/R Vol. 5, pp. 56-67; T/R Vol. 10, pp. 116-124, T/R Vol. 18, p. 5; T/R Vol. 21, pp. 43-45, 57-59; T/R Vol. 25, pp. 8-16; T/R Vol. 30, pp. 92-110; T/R. Vol. 26, p. 66)

During pretrial discovery, which is ongoing, Respondent was able to refute every defamatory statement attributed to identified sources (who repudiated the attribution) by deposition testimony, requests for production, sworn statements, and/or records from those sources. (T/R Vol. 11, pp. 52, 110-155; T/R Vol. 16, pp. 99-104, 124-131, 139-146; T/R Vol. 30, pp. 2-10, Dep. of Shutt, pp. 107-115; Vol. 31, pp. 47-48, 50, Dep. Isbell, pp. 16-20; T/R Vol. 35, Dep. Beck, pp. 84-85, 93-94; T/R Vol. 36, p. 82 *et seq.*)

Through depositions, interrogatories, requests for production, and requests for admission, under the Tennessee

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[1] Contrary to the claim of WorldNetDaily.com, the facts below show that it publicly claimed to have actively investigated, interviewed witnesses and obtained the information upon which the articles were based. (T/R Vol. 2, pp. 2-14; Farah Aft., filed 7/29/04, pp. 6-7, ¶55.)

Rules of Civil Procedure, the Respondent sought the identity of fact witnesses, including unidentified sources of the defamatory statements. Petitioners adamantly refused. Pursuant to Rule 37, T.R.C.P., Respondent moved to strike the defenses of Petitioners that relied upon the alleged unidentified sources. (T/R Vol. 1, pp. 14-17; T/R Vol. 3, pp. 20-34; T/R Vol. 3, pp. 83-84; T/R Vol. 4, pp. 96-100; T/R Vol. 4, pp. 101-102; T/R Vol. 10, pp. 68-70; T/R Vol. 14, pp. 16-18, 20-25, 35-36, 47, 85-86, 121-122, 107-108, 112, 133-134, 136-137, Dep. T. Hays, 12/2/03, pp. 46-48, 50-52, 65-66, 77, 108, 112, 133-134, 136-137, 141, 150-151; T/R Vol. 21, pp. 31-32, 67-73, Dep. T. Hays, 5/7/04, pp. 273-274, 309-315)

After giving the Respondents the opportunity to provide the discovery and their refusal, the trial court entered an Order on April 8, 2005, striking the defenses relying on the unidentified sources. (Petitioners' Appendix Q1.)

The Respondents filed an interlocutory appeal having as its only basis:

> T.C.A. §24-1-208[2] provides a Rule 3 statutory right of Appeal to this Court from the trial court's order of April 8, 2005.

(Brief of Hays & Thompson to Tennessee Court of Appeals, p. 2.)

None of the Respondents attempted to obtain permission for interlocutory appeal from the trial court based on Rule 9 or from the Tennessee Court of Appeals based on Rule 10 of the Tennessee Rules of Appellate Procedure.

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[2] Petitioners' Appendix Z1.

(Appendices A and B.) The Tennessee Court of Appeals found that no statutory news gatherer privilege exists under T.C.A. §24-1-208 in defamation cases and dismissed the appeal. (Petitioners' Appendix H1.) Petitioners Hays and Thompson, WorldNetDaily.com and Hagelin's requests for rehearing were denied. (Petitioners' Appendices D1 and E1.)

The Tennessee Supreme Court denied permission to appeal the ruling of the Court of Appeals. (Petitioners' Appendix A1.)

Respondents now seek certiorari.

REASONS CERTIORARI SHOULD BE DENIED

Review of the status of this litigation demonstrates that this case is not appropriate for certiorari.

I. There Is No Final Judgment In This Case. Therefore, There Is No Jurisdiction Under 28 U.S.C. §1257.

This case is in pretrial discovery. There has been no trial nor a final judgment by the Supreme Court of Tennessee. Therefore, the Petition fails for lack of jurisdiction. 28 U.S.C. §1257. *Johnson v. California*, 541 U.S. 428, 124 S.Ct. 1833, 158 L.Ed.2d 696 (2004); *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 94 S.Ct. 407, 38 L.Ed.2d 379 (1973).

II. (a) The Petitioners Had No Statutory Right To Interlocutory Appeal Of A Pretrial Ruling By The State Trial Court. As A Result, Their Appeal Below Was Dismissed.

The Petitioners seek a writ from this Court concerning a ruling by a state trial court as to pretrial discovery and evidence in a case not yet tried, where discovery is incomplete and where no interlocutory appeal exists.

Contrary to Petitioners' assertion, they had no statutory right to appeal the trial court's pretrial ruling. They did not request permission to appeal as required by the Tennessee Rules of Appellate Procedure, Rules 9 and 10.[3] Therefore, they waived any permissive appeal. Their appeal was wholly dependent on their claim to a statutory right that they did not possess under T.C.A. §24-1-208(c).

T.C.A. §24-1-208(a) provides for a limited news gatherer's privilege but subsection (b) specifically states:

> **Subsection (a) shall not apply with respect to the source of any alleged defamatory information in any case where the defendant in a civil action for defamation asserts a defense based on the source of such information.** (Emphasis added.)

Therefore, there is *no* privilege provided by the statute in a defamation case.

T.C.A. §24-1-208(c) provides that one seeking information protected under subsection (a) of the statute "may

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[3] Rules 9 and 10 of the Tennessee Rules of Appellate Procedure govern interlocutory appeals where no statutory right exists. Petitioners made no attempt below to comply with these rules.

apply for an order divesting such protection." Such requirement does not and cannot apply to this defamation case because under subsection (b), the limited statutory news gatherer privilege granted by subsection (a), does not exist. Since no privilege exists, the statutory procedure for appealing an order divesting the subsection (a) privilege set forth in subsection (c) does not apply. No privilege existed to be ordered divested. Respondent sought no order divesting any privilege. There was no "order" as defined by the statute to appeal.

(b) No Federal Statutory Or Constitutional Right Is Implicated By The Dismissal Of The Appeal.

The Tennessee courts interpreted the Tennessee statute and specifically found that there was no statutory privilege here. Therefore, the appeal provisions of the statute *ipso facto* were inapplicable *sub judice* and Petitioners' appeals were dismissed.

Using the mechanism of the nonexistent statutory right of appeal claimed under T.C.A. §24-1-208(c)(3)(A), Petitioners attempted to also argue on appeal that they possess a "qualified privilege" under the First Amendment, wholly separate from the statutory privilege upon which their interlocutory appeal had to be based. Since they did not seek a Rule 9 or 10 permissive interlocutory appeal of that issue or any other, they waived any interlocutory appeal on these issues.

Ignoring the procedural requirements for an interlocutory appeal, Petitioners now attempt to bootstrap their constitutional argument onto a non-existent statutory right to appeal the trial court's interlocutory ruling as to

discovery sanctions imposed under Rule 37, T.R.C.P. even though their appeal was "dismissed."

III. Petitioners Are Subject To The Procedural Rules Of Tennessee Courts.

Petitioners steadfastly refused to comply with the rules of discovery[4] before the trial judge and refused to identify fact witnesses, "confidential sources," of the defamatory material, even when given the choice between disclosure or having their defenses based upon such "sources" stricken. Striking those defenses dependent upon undisclosed "confidential sources" when the Petitioners steadfastly refused to produce discovery of the identity of those alleged fact witnesses is a recognized and appropriate remedy. Rule 37, T.R.C.P.; See also, *Dibble v. WROC TV Channel 8*, 142 A.D.2d 966, 530 N.Y. 2d 388 (N.Y. App. Div. 1988).

IV. No Common Law Or Tennessee Constitutional News Gatherer's Privilege Exists In Defamation Cases.

Rule 501 of the Tennessee Rules of Evidence provides:

> Except as otherwise provided by constitution, statute, common law, or by these or other rules promulgated by the Tennessee Supreme Court, no person has a privilege to:
>
> 1. Refuse to be a witness;
>
> 2. Refuse to disclose any matter;
>
> 3. Refuse to produce any object or writing; or

---

[4] Rules 26, 33, 34, 37, T.R.C.P.

4. Prevent another from being a witness or disclosing any matter or producing any object or writing.

There has never been a reporter's privilege recognized under Tennessee's Constitution, the common law, court rules, or the rules of evidence.

Section 19, Article I of the Tennessee Constitution reads, in pertinent part:

> That the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof.
>
> The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, *being responsible for the abuse of that liberty*. (Emphasis added.)

The Tennessee state constitution "does not constitutionalize false and malicious defamations, and publishers are answerable for abuse." *Press, Inc. v. Verran*, 569 S.W.2d 435 (Tenn. 1978). Thus, there is no evidentiary or shield privilege found in Tennessee's constitution or common law that would immunize defamers.

V. The Decision Below Is Not Contrary To The Precedents Of This Court Or Federal Law.

Petitioners seek to expand the very limited ruling of the Tennessee trial court and appellate courts below beyond their scope. In addition, they blur the distinction between the guarantee under the First Amendment to the United States Constitution that one may print or publish

what one chooses and no law may prohibit such publication and the clearly stated law that one is responsible for abusing that privilege in defamation cases. The First Amendment to the United States Constitution does not create a reporter's privilege as to disclosure of confidential sources. In *Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972), the Supreme Court rejected the claim of First Amendment privileges for reporters in a case involving a grand jury subpoena. The Court expressly declined to create a privilege that would interpret the First Amendment to grant reporters a testimonial privilege that other citizens do not enjoy. *Id.* at 690, 92 S.Ct. at 2661. The rejection of the claim of a First Amendment privilege was, however, broader than just grand jury proceedings as the Court also recognized that there are also situations "where a source is not engaged in criminal conduct but has information suggesting illegal conduct by others." In this situation, the Court was equally adamant in rejecting the claim of a First Amendment privilege. *Id.* at 693-695, 92 S.Ct. 2662-2663.

Significantly, the *Branzburg* court noted that the first assertion by a news gatherer of a privilege from public disclosure of confidential informant was pursuant to a subpoena issued in a civil defamation suit in *Garland v. Torre*, 259 F.2d 545 (2nd Cir. 1958), *cert. denied*, 358 U.S. 910, 79 S.Ct. 237, 3 L.Ed.2d 231 (1958).[5] In *Garland*, the asserted privilege was also denied. *Branzburg*, 408 U.S. at

[5] Even in non-defamation civil cases involving non-party witnesses, those courts that have recognized a statutory or common law qualified privilege have found that a litigant's right to evidence trumps any claim by the reporter to "confidential sources." See, for example, *Lee v. Department of Justice*, 413 F.3d 53 (D.C. Cir. 2005) (qualified privileged trumped by litigant's right to evidence).

686, 92 S.Ct. at 2659. That no privilege exists involves no restraint on what newspapers may publish or on the type or quality of information reporters may seek to acquire nor does it threaten the vast bulk of confidential relationships between reporters and their sources. *Id.* at p. 691, 92 S.Ct. at 2661. The First Amendment does not reach so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to all other persons. *Id.* The defamation alleged here is such reprehensible conduct.

The common law recognized no such privilege and any argument based on any constitutional argument was not even asserted until 1958. *Id.* at 698, 92 S.Ct. 2665. "From the beginning of our country, the press has operated without constitutional protection for press informant, and the press has flourished." The court noted that the administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. *Id.* at 703, 92 S.Ct. 2668. As an example, the court points out that any author could quite accurately assert that he is contributing to the flow of information to the public and that he relies on confidential sources that would be silent if he is forced to make disclosure. *Id.*

Thus, *Branzburg* "flatly rejected any notion of a general-purpose reporter's privilege for confidential sources, whether by virtue of the First Amendment or a newly hewn common law privilege." *In re Special Proceedings*, 373 F.3d 37, 44 (1st Cir. 2004); *accord In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005), *reh. en banc denied*, 405 F.3d 17 (D.C. Cir. 2005), *cert. denied, Miller v. U.S.*, 545 U.S. 1150 (2005), *opinion superseded by In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141 (D.C. Cir. 2006).

Respondent respectfully submits, therefore, that there is no constitutional protection under the First Amendment for a claimed reporter's privilege and, especially, in a defamation action and the decision of the state courts dismissing Petitioners' interlocutory appeal does not even arguably raise a constitutional question.

CONCLUSION

Since the decision from which Petitioners seek certiorari is an interlocutory decision interpreting a Tennessee statute, the Tennessee Supreme Court has not decided any important federal question in a way that conflicts with the precedent of this court or any other state court of last resort nor has it decided an important question of law that has not been settled by this Court. See, Supreme Court Rule 10(b) and (c).

For all of the above reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

TENNESSEE RULES OF APPELLATE PROCEDURE

C. APPEAL BY PERMISSION

RULE 9. INTERLOCUTORY APPEAL BY PERMISSION FROM THE TRIAL COURT.

(a) Application for Permission to Appeal; Grounds. Except as provided in rule 10, an appeal by permission may be taken from an interlocutory order of a trial court from which an appeal lies to the Supreme Court, Court of Appeals or Court of Criminal Appeals only upon application and in the discretion of the trial and appellate court. In determining whether to grant permission to appeal, the following, while neither controlling nor fully measuring the courts' discretion, indicate the character of the reasons that will be considered: (1) the need to prevent irreparable injury, giving consideration to the severity of the potential injury, the probability of its occurrence, and the probability that review upon entry of final judgment will be ineffective; (2) the need to prevent needless, expensive, and protracted litigation, giving consideration to whether the challenged order would be a basis for reversal upon entry of a final judgment, the probability of reversal, and whether an interlocutory appeal will result in a net reduction in the duration and expense of the litigation if the challenged order is reversed; and (3) the need to develop a uniform body of law, giving consideration to the existence of inconsistent orders of other courts and whether the question presented by the challenged order will not otherwise be reviewable upon entry of final judgment. Failure to seek or obtain interlocutory review shall not

limit the scope of review upon an appeal as of right from entry of the final judgment.

(b) Procedure in the Trial Court. The party seeking an appeal must file and serve a motion requesting such relief within 30 days after the date of entry of the order appealed from. When the trial court is of the opinion that an order, not appealable as of right, is nonetheless appealable, the trial court shall state in writing the reasons for its opinion. The trial court's statement of reasons shall specify: (1) the legal criteria making the order appealable, as provided in subdivision (a) of this rule; (2) the factors leading the trial court to the opinion those criteria are satisfied; and (3) any other factors leading the trial court to exercise its discretion in favor of permitting an appeal. The appellate court may thereupon in its discretion allow an appeal from the order.

(c) How Sought in Appellate Court; Cost Bond. The appeal is sought by filing an application for permission to appeal with the clerk of the appellate court within 10 days after the date of entry of the order in the trial court or the making of the prescribed statement by the trial court, whichever is later. A sufficient number of copies shall be filed to provide the clerk and each judge of the appellate court with one copy. The application shall be served on all other parties in the manner provided in Rule 20 for the service of papers.

APPENDIX B

TENNESSEE RULES OF APPELLATE PROCEDURE

APPEAL BY PERMISSION

RULE 10. EXTRAORDINARY APPEAL BY PERMISSION ON ORIGINAL APPLICATION TO THE APPELLATE COURT.

(a) Original Application for Extraordinary Appeal; Grounds. An extraordinary appeal may be sought on application and in the discretion of the appellate court alone of interlocutory orders of a lower court from which an appeal lies to the Supreme Court, Court of Appeals or Court of Criminal Appeals: (1) if the lower court has so far departed from the accepted and usual course of judicial proceedings as to require immediate review, or (2) if necessary for complete determination of the action on appeal as otherwise provided in these rules. the appellate court may issue whatever order is necessary to implement review under this rule.

(b) How Sought; Cost Bond. An extraordinary appeal is sought by filing an application for an extraordinary appeal with the clerk of the appellate court. A sufficient number of copies shall be filed to provide the clerk and each judge of the appellate court with one copy. Unless necessity requires otherwise, the application shall be served on all other parties in the manner provided in rule 20 for the service of papers. The appeal shall be docketed in accordance with rule 5(c) upon the filing of the application with the clerk of the appellate court. An appeal from the denial of an application for extraordinary appeal by an intermediate appellate court is sought by filing an application in the Supreme Court as provided for in this

rule within 30 days of the filing date of the intermediate appellate court's order. A bond for costs as required by Rule 6 shall be filed with the application.

(c) Content of Application. The application shall contain: (1) a statement of the questions presented for review; (2) a statement of the facts necessary to an understanding of why an extraordinary appeal lies; (3) a statement of the reasons supporting an extraordinary appeal, and (4) the relief sought. The application shall be accompanied by copies of any order or opinion or parts of the record necessary for determination of the application. The application may also be supported by affidavits or other relevant documents. The application to the Supreme Court shall include the application filed in the intermediate appellate court and a copy of the intermediate appellate court's order.

(d) Subsequent Procedure. If the appellate court is of the opinion that an extraordinary appeal should not be granted, it shall deny the application. Otherwise, the appellate court shall order that an answer to the application be filed by the other parties within the time fixed by the order. The order shall be served on all other parties and if the application has not previously been served shall have attached thereto a copy of the application. The appellate court shall advise the parties of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument, if oral argument is granted.

(e) Appeal in Criminal Actions. Permission to appeal under this rule may be sought by the state and defendant in criminal actions.

[Amended effective July 1, 1999; July 1, 2005.]

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(3)

No. 06-1611

FILED

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

TONY HAYS and CHARLES C. THOMPSON, II,
Petitioners/Appellants

And

WORLDNETDAILY.COM and REBECCA HAGELIN,
Petitioners/Appellees

v.

CLARK JONES,
Respondent/Appellee

Reply Brief to Respondent's Brief in Opposition

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION
With Appendix

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July 2007

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Appendix A: Consent Order On Stay Of Proceedings 3

On June 25, 2007, Respondent, Clark Jones (hereinafter "**Respondent/Plaintiff**"), in response to the petition for writ of certiorari filed by petitioners (hereinafter "**Petition**"), Tony Hays, Charles C. Thompson II, WorldNetDaily.com and Rebecca Hagelin (hereinafter "**Petitioners/Defendants**") filed what is titled "Respondent's Brief in Opposition" (hereinafter "**Response**"). Pursuant to ***Rules Of The Supreme Court Of The United States***, Rule 15.5, Petitioners/Defendants reply to the Response as follows.

Reply One: §1257 Finality

Respondent/Plaintiff asserts that this Court is required to deny the Petition because this Court lack subject matter jurisdiction for the lack of finality pursuant to Title 28, ***United States Code*** §1257.

The argument concerning jurisdiction for lack of finality is premised on a foundation that is inconsistent with the state of the record and is unsupportable in light of controlling precedent from this Court.

A statement of the controlling law appears in ***Kansas v. Marsh, II***, ___ U.S.___, 126 S.Ct.2516, 165 L.Ed.2d 429 (2006) where this Court stated as follows at 2525-2521:

> Title 28 U.S.C. §1257 authorizes this Court to review, by writ of certiorari .. . The court has determined that the foregoing authorization permits review of the highest court of a State, even though the state-court proceedings are

> not yet complete, 'where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case.' *Cox Broadcasting* [*Corp. v. Cohn*, 420 U.S. 469], *supra* at 481,...[1975].

Another statement of the prevailing rule concerning the finality prerequisite to this Court's subject matter jurisdiction appears in ***Nike Inc v. Kasky***, 559 U.S. 654, 658 (2003).

In ***Nike***, this Court cited ***Radio Station WOW Inc. v. Johnson***, 326 U.S. 120, 124 (1945) as authoritative.

The state of the record in the instant case could not more tightly fit what this Court describes by the above case authority.

Respondent/Plaintiff labors to convince this Court that the Petition is presented to this Court by an unauthorized interlocutory appeal.

This is opposite from the position taken by Respondent/Plaintiff in the trial court and the court of appeals and is incorrect, irrespective of the position taken by Respondent/Petitioner.

In the trial court, Respondent/Plaintiff filed the motion that produced the order that produced the appeals, which are the subject of the Petition. Respondent/Petitioner's

motion invoked the Tennessee Shield Law codified in ***Tennessee Code Annotated*** §24-1-208.

The defense against the motion revolved around §24-1-208 and the requirements of the United States Constitution (Pet., App. N, S, T).

The trial court entered its April 8, 2004 order (Pet., App. Q), granting the relief sought by Respondent/Plaintiff, by reference to §24-1-208.

On June 21, 2004, the trial court entered what is titled "Consent Order On Stay Of Proceedings" (**Appendix A hereto**), to which counsel for Respondent/Plaintiff signified consent, by which Respondent/Plaintiff explicitly acknowledged that the appeal by Petitioners/Defendants was an appeal authorized by §24-1-208 and, because of this, the agreed stay is mandated by §24-1-208.

The court of appeals below received and docketed the appeal in the instant case as an appeal pursuant to ***Tennessee Rules of Appellate Procedure***, Rule 3, an appeal as a matter of right, i.e., for appellate purposes, the order in question is final.

The subject order of the court of appeals (Pet. App. H) is seven paragraphs. Five of the seven reference §24-1-208. The subject appeal as of right has never been about anything other than §24-1-208 and the First Amendment implications of it and/or its application in this case.

The court of appeals decided that, since §24-1-208 explicitly prohibits Petitioners/Defendants from asserting any a privilege to withhold disclosure, in the context of a

defamation case, Petitioners/Defendants had no right to rely on §24-1-208 to resist an order of the trial court requiring disclosure; *a fortiori*, §24-1-208 did not provide Petitioners/Defendants right to appeal, according to the provisions of §24-1-208(c); on this circular reasoning, the court of appeals dismissed the appeal. This is classic bootstrapping.

Respondent/Plaintiff capitalizes on and reasons from this circular reasoning and tries to apply it in hindsight. The faulty logic produces a faulty conclusion, i.e., since the court of appeals decided the newsgatherers are prohibited by §24-1-208 from asserting a claim of privilege of nondisclosure, there was no right to be denied Petitioners/Defendants under §24-1-208, the newsgatherer Petitioners/Defendants had no rights which, if denied, could be appealed under §24-1-208.

The whole question presented for review by this Court is whether the ruling of the court of appeals is erroneous.

The construction the court of appeals gave §24-1-208 makes the order of the trial court from which the appeal is taken no less an order explicitly entered under and based on §24-1-208 and makes the decision of the court of appeals no less a decision, in a Rule 3 appeal, governed by §24-1-208(c).

In the trial court, in the court of appeals, in the Tennessee supreme court, and, now, in this Court, Petitioners/Defendants have consistently asserted by motion, responses and briefing that §24-1-208 provided a

shield protecting the freelance newsgatherers from having to disclose confidential sources. Petitioners/Defendants, from the beginning, have claimed that §24-1-208 is a codification of what the United States Constitution provides, even without §24-1-208.

While the court of appeals did not address the claims of Petitioners/Defendants concerning the United States Constitution, the court of appeals construed §24-1-208 as explicitly requiring from the Petitioners/Defendants who are newsgatherers (i.e., Hays and Thompson) that which Petitioners/Defendants have claimed from the beginning that the United States Constitution prohibits any court from requiring.

While the claim of Petitioners/Defendants did not commence as a challenge to the constitutionality of §24-1-208, as the issue developed before the court of appeals, the constitutionality of §24-1-208 was drawn in question; therefore, Tennessee's Attorney General made appearance.

The ruling of the court of appeals construed §24-1-208 in such a way as to crystallize and make paramount the claims concerning either the constitutionality or the unconstitutional application of §24-1-208.

The Response attempts to convert what has been an appeal relative to the constitutional right of freelance newsgatherers to withhold disclosure of confidential sources in civil defamation cases into a discovery dispute.

Never, throughout the disputation on the issue at hand, has the dispute been litigated as a discovery dispute.

However, if it had been disputed from the inception as a discovery dispute, the same claim of constitutional rights is before this Court.

Indeed, §24-1-208 is predicated on what, in practical effect, is a special circumstance discovery procedure, i.e., the terms of §24-1-208 prohibit a court from ordering disclosure, under specified circumstances, and, if disclosure is ordered, the newsgatherer is given opportunity to challenge the order to disclose by a Rule 3 appeal as of right and stays all further trial court proceedings until the appeal has run its full course.

In some cases, disclosure orders use civil contempt powers to incarcerate the newsgatherer, subject to the newsgatherer or obeying the order and disclosing the confidential source. The trial court's order does not use the civil contempt power to incarcerate; rather, the court has ordered disclosure subject to a different kind of penalty, i.e., disclose or sacrifice truth as a defense. This difference is quantitative and not qualitative. This appeal is about what is qualitative.

If disclosure is ordered, under threat of sanction by court order, whether the order emanates from a discovery dispute or §24-1-208 is form over substance. The substance focuses on whether the United States Constitution permits a court to punish **(in all cases and without any showing of necessity by the defamation case plaintiff)** a freelance newsgatherer, in the context of a civil defamation case, for exercising what the freelance newsgatherer asserts to be a

right guaranteed by the United States Constitution to withhold disclosure of the confidential source.

The necessary "finality" occurs by virtue of the fact that the courts force the freelance newsgatherer to suffer the sanction which, when suffered, creates an irreparable harm.

Waiting until after either the freelance newsgatherer has endured a lengthy trial, in which the newsgatherer is prohibited from asserting truth as a defense, on the civil defamation claims of Respondent/Petitioner or, to enable himself to assert truth, breach the confidence of the confidential source, as prerequisite to have the constitutional legality of the sanction reviewed by this Court, makes the review a futile attempt to put humpty dumpty back together.

If a newsgatherer breaches the confidence of the confidential source in order to preserve the truth defense, who will be legally obligated to pay damages to the confidential source because of the newsgatherers' breach?

If, because unable to rely on the truth defense, the freelance newsgatherer suffers a verdict in damages in the defamation case, who will be legally responsible for either paying the defamation judgment or, even, paying the cost of the supersedeas bond while the freelance newsgatherer exercises his appellate right?

The State of Tennessee and its judicial officers have immunity that shields both from any liability, even if the freelance newsgatherer is ultimately vindicated. Likewise, Respondent/Plaintiff would have no liability because of the

judicial immunity accorded him from being a party in litigation, presuming his suit was initiated and continued without the malice prerequisite to liability for malicious prosecution.

Thus, unless afforded the review on appeal that §24-1-208 assures newsgatherers, a newsgatherer could win the battle over the newsgatherer's constitutional right not to disclose confidential sources and lose the war because the battle came too late.

Reply Two: First Amendment Effects

As it presently stands, any newsgatherer in the United States who gathers information from a confidential source and publishes or causes that information to be published in such a fashion that it reaches Tennessee and/or affects a person in Tennessee who claims to be defamed by the information, on such person making a claim for defamation, the newsgatherer can be hauled into court in Tennessee and, with **no** other **questions** to be asked (e.g, **need on the part of the plaintiff claiming defamation**), can be forced by court order to disclose the identity of the confidential source.

The sanction imposed by the court below was sacrifice of the truth defense. There is nothing that limits future courts to such a sanction. The court order to disclose could come in the context of an order to compel, in a discovery dispute, and, on non-compliance, the court could enter a default judgment against the newsgatherer or impose a *per diem* economic penalty. Indeed, courts are given wide

discretion in creating sanctions to compel compliance with orders to disclose discoverable information. And, there is nothing to prohibit criminal contempt proceedings against the newsgatherer for failure to comply with a court order.

To say that this chills exercise of First Amendment rights is a understatement. To say that the impact of this chilling effect is nationwide is a mere recognition of reality.

One hundred years ago, this Court succinctly stated as follows in ***Patterson v. Colorado ex. rel. Atty General,*** 205 U.S. 454, 462 (1907):

> The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative. A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint 'freezes' it for the time.

See also, ***Nebraska Press Ass'n v. Stuart,*** 427 U.S. 539, 559 (1976).

Another poignant statement by this Court appears as follows in ***New York Times v. United States,*** 403 U.S. 713, 714 (1971):

> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions, and to do so on pain of libel judgments virtually unlimited in amount, leads to ... self-censorship ... . [A]llowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.

Statutes creating conclusive presumptions that preclude the ascertainment of truth are unconstitutional. ***United States v. Wells***, 283 U.S. 102, 116-17; ***Heiner v. Donnan***, 285 U.S. 312, 328 (1932). The sanction imposed by the trial court below and affirmed by the court of appeals, in essence, denies Petitioners/Defendants opportunity to claim that what was reported was true, even though it emanated from a confidential source. This is the creation of a conclusive presumption that is an impediment on ascertainment of the truth.

IN THE CIRCUIT COURT OF HARDIN COUNTY
TENNESSEE

CLARK JONES

v.

TONY HAYS, ET AL.

No. 3414

CONSENT ORDER ON STAY OF PROCEEDINGS

It appearing to the Court that the Defendants, Tony Hays and Charles C. Thompson, II, have filed a Notice of Appeal to The Court of Appeals at Jackson from the Order entered April 8, 2005 regarding sources of information procured for publication or broadcast, and that the Parties hereby acknowledge that under T.C.A. 24-1-208 (B) the proceedings and trial in this action are stayed.

IT IS THEREFORE ORDERE BY CONSENT:

That the proceedings and trial of this action are hereby stayed pursuant to T.C.A. 24-1-208 (B).

/s/ Charles O. McPherson
Special Circuit Court Judge

Date: 6-21-04

Approved and Agreed for Entry:

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